BRIBERY

Government Response to the conclusions and recommendations of the Joint Committee Report on the Draft Bribery Bill

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Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty

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Introduction

The draft Bribery Bill (Cm7570) was published by the Ministry of Justice on 25 March 2009 for pre-legislative scrutiny. A Joint Committee established by the two Houses of Parliament held its first meeting on 12 May 2009 and appointed Viscount Colville of Culross as Chairman. The Joint Committee heard oral evidence from 37 witnesses and received 61 written submissions over a period of five weeks. Its report was published on 28 July 2009.

We are pleased that the Joint Committee supported the draft Bill overall, including the framework of two general offences, a discrete offence of bribery of a foreign public official and an offence of a failure on the part of a commercial organisation to prevent bribery. We have carefully considered the Joint Committee's report and respond below to the specific recommendations and conclusions of the Committee.

We are most grateful to Viscount Colville, the members of the Joint Committee, the Clerks to the Committee, other Committee staff and all those who contributed to the proceedings. The Committee showed considerable commitment to complete the report in a very challenging timescale. The Joint Committee's thorough examination of the draft Bill and its consideration of the evidence from a wide selection of witnesses demonstrate the value of the process of pre-legislative scrutiny to the development of legislation. The Government's Bribery Bill, which we are also publishing today, reflects many of the recommendations.

Background

1. We welcome the draft Bribery Bill as an important opportunity to modernise the criminal law of bribery; this will assist in fulfilling the United Kingdom's international obligations more effectively. We urge the Government to introduce the Bill as soon as possible in view of its protracted and faltering history and to take full account of our recommendations. (Paragraph 16)

The Government welcomes the Committee's support for the draft Bill, which provides a modern and comprehensive scheme of bribery offences, in order to allow investigators, prosecutors and the courts to tackle bribery effectively. We also welcome the Committee's detailed consideration of the Bill, and our response to the specific conclusions and recommendations are set out below. The Government's Bribery Bill published today reflects many of the Committee's recommendations.

The offences of bribing and being bribed

2. We endorse the "improper" performance test that has been developed by the Law Commission to distinguish bribes from legitimate conduct under the two proposed offences of bribing (clause 1)[1] and being bribed (clause 2). In particular, the reliance on a reasonable person's expectation of "good faith", "impartiality" and "trust" represents a careful balance between simplicity, certainty and effectiveness. It also takes into account the approach adopted in other countries and international anti-bribery conventions. (Paragraph 35)

We welcome the Committee's endorsement of the approach taken in the draft Bill to the formulation of the general bribery offences.

3. We do not consider that the proposals in the draft Bill, taken together with existing criminal offences, will leave any gaps in the law. We do, however,

[1] References to clauses in this response are references to the Draft Bill published on 25 March 2009.

acknowledge the concern that conduct which ought to be viewed as a civil wrong may, in future, be criminalised. The limited time for completing our inquiry has prevented us from exploring possible solutions to this problem, although we note the potential for developing an effective "avoidance of doubt" provision. The Government must address this issue before introducing the Bill into Parliament in order to minimise the need for reliance on prosecutorial discretion and maximise certainty for all those who will be asked to comply with, and enforce, the new law. (Paragraph 36)

We consider that the draft Bill appropriately covered conduct which should amount to an offence of bribery and have not made any changes in this respect. We believe that it is entirely possible that what might amount to a "civil wrong" in certain cases may also result in an appropriate prosecution under the general offences. If a case comes to the attention of the prosecuting authorities in which the circumstances dictate that the facts are more appropriately dealt with as a civil matter the public interest may not lie in favour of a prosecution. Overlap between civil and criminal law is not unusual and does not give rise to any significant difficulties in practice. Many criminal offences can in theory apply to conduct that is also a civil wrong (e.g. frauds, criminal assault) or conduct which most people would not consider "criminal" at all (e.g. taking another person's box of matches and striking one of them without that person's permission is technically arson) and relying on prosecutorial discretion is the appropriate way to deal with such matters.

4. While we accept that it may occasionally be appropriate to consider cultural variations on issues such as hospitality, a careful line needs to be drawn. The draft Bill must in general prevent individuals from relying on local customs to justify corrupt practices, otherwise its effectiveness will be seriously undermined. We see merit in the Law Commission's proposal that jurors should apply the standards of a "person of moral integrity". Nevertheless, the evidence that we received revealed continuing uncertainties over what this would mean in practice. The Government should

clarify its intended approach to the important and difficult matter of cultural variations before the Bill is introduced. (Paragraph 41)

In addition to the aim of maintaining the high ethical standards commonly found in the UK, an important element of the Government's policy in this area is to encourage a change in culture in emerging markets away from the cynical and pragmatic acceptance of bribery as the only effective way of doing business. We believe it is important therefore that foreign local custom and practice play no role in a criminal court's consideration of bribery charges.

Clause 3 of the draft Bill included an objective test as to what amounts to a breach of a relevant expectation. However, we accept that, on balance, there may be a risk of uncertainty. The evidence before the Joint Committee suggests that questions relating to what standards should apply, and what factors the jury should take into account, could arise in the absence of any express clarification. Accordingly the Government's amended Bill ensures that the test of what is expected is a test of what a reasonable person in the United Kingdom would expect. Local custom and practice are expressly excluded from the assessment unless they are permitted or required by the written law applicable to the country or territory concerned.

5. On balance we support the provisions in the draft Bill that enable a person to be convicted of being bribed (clause 2) without proof of knowledge or intention, notwithstanding that subjective fault should ordinarily be required by the criminal law. This policy forms an important part of changing the culture in which taking a bribe is viewed as acceptable. In particular, we think that it should encourage anyone who is expected to act in good faith, impartially or under a position of trust, to think twice before accepting an advantage for their personal gain. (Paragraph 46)

We welcome the Committee's support for the Government's approach.

6. Once the operation of a Bribery Act has become established, the Government should ask the Law Commission to review the Honours (Prevention of Abuses) Act 1925 to determine whether it remains necessary in light of the new offences. (Paragraph 50)

The Government agrees that the utility of the Honours (Prevention of Abuses) Act 1925 should be reviewed once the Bribery Act is established. We will consider the best way of undertaking this task in due course.

Bribery of foreign public officials

7. The proposed offence of bribing foreign public officials (clause 4) represents an important step in putting the United Kingdom's compliance with its international obligations beyond doubt. To ensure that this goal is achieved, we recommend that the reference in clause 4 to the "law" be replaced with a reference to the "written law", meaning statutes, regulations and case law. This amendment should remove the potential for loopholes to emerge, while providing greater certainty to prosecutors, jurors and businesses alike. It should also provide an appropriately narrow gateway restricting the circumstances in which advantages can legitimately be provided to foreign public officials. (Paragraph 64)

8. The Law Commission's proposal for a "reasonable belief" defence raises a range of difficult and competing interests. We are, in particular, sensitive to the challenges faced by those who conduct business under unfamiliar laws abroad. But we also appreciate the concerns of those who view the defence as inconsistent with the United Kingdom's international obligations and the policy aims of the draft Bill. On balance, we support the Government's decision to reject the defence. (Paragraph 71)

The Government welcomes the Committee's support of the proposed offence of bribery of a foreign public official, and of the decision not to propose a defence. We agree that the offence should be restrictive in respect of the circumstances in which advantages can legitimately be provided to foreign public officials. We also agree that only written law should be determinative of whether the conduct is lawful. After considering this recommendation the Government takes the view that the real issue is whether the foreign public official is permitted or required to be influenced by the offering, promising or giving of advantages. The Government's revised Bill therefore provides that the conduct will amount to bribery where the foreign public official is neither permitted nor required by the applicable written law to be

influenced by the offer, promise or giving of an advantage. The Bill further provides that "written law" means any written constitution, primary or secondary legislation applicable to the country or territory concerned and case law from written sources.

Negligent failure by organisations

9. We support the Government's proposals for a new offence that targets companies and partnerships which fail to prevent bribery by persons acting on their behalf. The current law has proven wholly ineffective and in need of reform. However, we are concerned by the focus on whether a "responsible person" was negligent, rather than on the collective failure of the company to ensure that adequate anti-bribery procedures were in place. In our view, clauses 5 and 6 introduce a narrow and complex solution to a pressing problem. We therefore recommend the removal of the need to prove negligence under clause 5(1)(c). While it would lead to the commercial organisation being strictly liable, subject to an adequate procedures defence, nevertheless we do not believe this would be unfair, particularly given the parallel with the approach taken in other leading countries. A commercial organisation is well placed to demonstrate the adequacy of its procedures, preferably on a probative burden of proof. (Paragraph 89)

On reflection, the Government agrees that there may be a risk that requiring the prosecution to prove negligence may involve unnecessary complexity and may have the potential to undermine the broad policy objectives of bringing about a shift away from a corporate culture that is more tolerant of bribery and promoting effective corporate anti-bribery procedures. The Committee's proposed approach is also likely to be more effective in motivating commercial organisations to self-refer bribery disclosed by internal monitoring.

The Government therefore accepts the Committee's view that removing the requirement to prove negligence provides a clearer approach. The Government's Bill now requires that a person associated with the commercial organisation intended to obtain business, or to obtain or retain an advantage in the conduct of

business for the organisation by paying the bribe but does not require the prosecution to prove that the bribery took place as result of negligence.

10. We do not accept the merits of increasing the threshold of the offence to "gross negligence" or the introduction of an alternative civil enforcement regime, since neither will satisfy the policy aims of the draft Bill. (Paragraph 90)

11. We note two important points that emerged on the meaning of the phrase "adequate procedures" in clause 5:

- **First, it must be interpreted in a flexible and proportionate way depending on the size and resources of the company, alongside the ethical risks associated with the industry, geographical area and the types of transaction concerned.**

- **Second, it must depend on what a commercial organisation is doing in practice rather than in theory. (Paragraph 92)**

The Government agrees with both of the points made at paragraph 11.

12. The adequate procedures defence does not apply where a "senior officer" is negligent in performing their role as a responsible person by virtue of clause 5(5). It is hard to imagine any circumstances in which the procedures would be adequate where a senior officer was at fault. In line with our recommendation to remove the requirement to prove negligence, we further recommend that clause 5(5) be removed. This would leave the role that has been played by senior officers to be determined as part of the adequate procedures defence. It would also reflect difficulties identified in relation to the meaning of the term "senior officer". (Paragraph 103)

Given that we accept the recommendation to remove the requirement to prove negligence in recommendation 9, we also accept the recommendation to remove the exclusion of the defence in relation to senior officers. Where the evidence suggests culpability at managerial or board level, our view is it is appropriate to

allow the court to consider this in its assessment of whether the organisation's procedures were adequate in the circumstances.

We agree that this approach is more likely to have the benefit of simplicity and will also remove the possibility of small or medium sized organisations being disadvantaged by the greater likelihood of the senior management being responsible for preventing bribery on the organisation's behalf. It also overcomes the difficulties associated with the meaning of the term "senior officers".

13. We note that a parent company's liability for a subsidiary is one of the issues due to be considered as part of the Law Commission's general review of corporate criminal liability and we anticipate that the Law Commission's conclusions will valuably inform future debate on this difficult issue. (Paragraph 105)

Guidance

14. We support calls for official guidance to be prepared on key aspects of the draft Bill in the interests of promoting certainty. It would, in particular, help commercial organisations to stay within the law and remove the excuse from those who do not. We therefore recommend the introduction of a new clause giving the Government power to approve guidance prepared by appropriate bodies, in line with the model that already exists under the Money Laundering Regulations. We believe that this represents a workable solution that will build on the growing expertise within the private sector, while limiting the burden on Government. (Paragraph 117)

15. Official guidance on how to comply with the provisions of the draft Bill should, at a minimum, cover the meaning of "adequate procedures". The process of sanctioning guidance should provide an opportunity for professional bodies to work alongside Government in identifying any further areas in which clarification is required. These could include, for instance, questions about the application of the draft Bill to subsidiaries, joint ventures and commercial agents. (Paragraph 121)

16. There is no reason why the preparation of official guidance should delay the passage of a Bribery Bill. It should, however, be available for use before the offences come into force in order to give businesses time to prepare for its introduction. (Paragraph 123)

The Government agrees that guidance on the Bill should be available to commercial organisations. However, in our view, it would not be appropriate to add a clause to the Bill giving the Government power to approve guidance prepared by others. Such an approach is more appropriate for more closely regulated areas such as health and safety or money laundering rather than for mainstream criminal offences such as bribery.

We believe that the non-statutory guidance such as that which was issued in relation to the Corporate Manslaughter and Corporate Homicide Act 2007 would provide a more appropriate model for bribery law. It is our intention to publish such guidance after the new Bill receives Royal Assent but before the offences come into force, to give business time to prepare. This guidance will naturally cover the Government's policy aims as regards the new legislation as a whole including the new failure to prevent bribery offence, and, in particular, would cover the adequate procedures defence. In order to provide organisations with the necessary flexibility to develop procedures appropriate to their own circumstances and business sectors, we intend that the guidance will be indicative by setting out broad principles and illustrative good practice examples of 'adequate procedures' rather than detailed and prescriptive standards.

17. We acknowledge that a formal advisory service similar to that provided in the United States and Hong Kong, could have great benefit. We note, however, that differences between our criminal justice systems prevent direct analogies being drawn and mean that it would in practice be difficult to establish such a service. We are therefore not persuaded that the Government should seek to establish an equivalent in the United Kingdom. We are particularly concerned about its potential impact on the independence of prosecutors. (Paragraph 129)

We welcome the Committee's conclusion.

Special cases

18. We agree with the Government that facilitation payments should continue to be criminalised. A specific defence risks legitimising corruption at the thin end of the wedge. At the same time we recognise that business needs clarity about the circumstances in which facilitation payments will be prosecuted, particularly given the difficult situations that can arise. Therefore the basic principles of prosecution policy, which we would expect to adhere firmly to the concept of proportionality, must be made clear. But we would not welcome guidance that was so detailed that it effectively introduced a defence into the law. (Paragraph 138)

We welcome the Joint Committee's conclusion that facilitation payments should continue to be criminalised. The existing Code for Crown Prosecutors outlines the basic principles of prosecution policy which apply to criminal cases. The Code fully reflects the principles of proportionality. Where payments are unlawful but small, prosecutors can already use their discretion and reach decisions applying the public interest factors set out in the Code for Crown Prosecutors. The outcome in any particular case will depend on the full circumstances of the case. Business should be aware that the continued practice of making such facilitation payments carries with it the risk of prosecution.

19. Corporate hospitality is a legitimate part of doing business at home and abroad, provided it remains within appropriate limits. The general offences impose an appropriate limit on this activity under the "improper" performance test. However, the main limit under clause 4 is based on prosecutorial discretion. We are content with this and call on the Government to reassure the business community that it does not risk facing prosecution for providing proportionate levels of hospitality as part of competing fairly in the international arena. (Paragraph 147)

We welcome the Committee's acknowledgment that the general offences impose appropriate limits and that prosecutorial discretion is appropriate in relation to the offence of bribery of a foreign public official.

We confirm that the Government does not intend that this legislation should be used to penalise the legitimate and proportionate use of corporate hospitality to establish or maintain good relations with prospective customers.

Jurisdiction

20. **The draft Bill would extend the jurisdiction of the new offences to include actions by anyone who is "ordinarily resident" anywhere in the UK (clause 7(4)). We welcome this proposal, which ensures that individuals cannot live within the UK without being subject to the same criminal law as citizens. (Paragraph 152)**

21. There are two matters that the Government must consider clarifying in relation to the jurisdiction of clause 5 prior to the Bill's introduction:

- **The meaning of "carries on a business" and "part of a business".**
- **The need to prove an offence under clauses 1, 2 or 4 as part of proving an offence under clause 5. (Paragraph 157)**

As regards the first matter, the Government has considered alternative terms that could be employed to link the organisation to the United Kingdom but believes the Courts will interpret the phrase "carries on a business" and "part of a business" in a common sense manner.

As regards the second matter, the Government's revised Bill expressly removes the jurisdictional restrictions that apply to the active general offence and the offence of bribery of a foreign public official when proving the offence relating to commercial organisations.

22. We note that a range of options has been proposed for extending the jurisdiction of clause 5, and anticipate that the Law Commission's review of corporate criminal liability will valuably inform the Government's consideration of them. (Paragraph 159)

23. We hope that the Government will succeed in its aim of ensuring that Crown Dependencies and British Overseas Territories bring their laws into

line with the proposals in the draft Bill, including clause 5. The size and significance of the corporate community in some of those jurisdictions makes this a task that should be pursued vigorously. (Paragraph 162)

We will continue to work with Crown Dependencies and Overseas Territories to encourage them to implement equivalent legislation.

24. We are surprised that the Government has not reached an agreement with the Scottish Executive about the approach to be taken, given the length of time that the draft Bill has been subject to consultation and the importance of meeting the UK's international obligations, and we urge that this be brought to a conclusion without further delay. (Paragraph 164)

Reform of the law on bribery is a devolved matter which falls within the legislative competence of the Scottish Parliament. Following its own consultation on reforming the law on bribery, the Scottish Government has indicated that it intends to ask the Scottish Parliament to consent to the inclusion of provisions in the Bill to extend it to Scotland. The Bill for introduction includes provisions extending it to Scotland.

The Attorney General

25. The Attorney General's powers of consent and direction raise complex constitutional issues that lie at the heart of ensuring parliamentary accountability for the criminal justice system. We agree with the Government that the power of direction should remain in place without being reformed by the draft Bribery Bill. Since this power will remain in place, we are satisfied that the power of consent should be transferred from the Attorney General to the Directors of the prosecuting authorities (clause 10). Any broader reform of the Attorney General's Office, including her power of direction, must await comprehensive proposals being pursued in the future. (Paragraph 171)

The report notes that, at the time of the Committee's scrutiny of the draft Bill, the Attorney General was in the process of developing a protocol governing her relationship with the Directors of the prosecuting authorities. This protocol has now

been published[2]. It indicates that the Attorney will not seek to give a direction to a prosecutor in an individual case save very exceptionally where necessary to safeguard national security (paragraph 4.3). If any such direction were made, the Attorney would make a report to Parliament, so far as was compatible with national security (paragraph 4(b)(4). No change in the law is required to bring about this and other proposed reforms to the Attorney's role, and the Government has decided not to bring forward any legislation relating to the Attorney[3].

26. Any transfer of consent from the Attorney General to the Directors of the prosecuting authorities, or otherwise, should limit the Directors' power to delegate their role in relation to bribery cases to senior postholders who are nominated and identified under the protocol for prosecutors. We call on the Attorney General to implement this recommendation before any of the proposed offences enter into force. (Paragraph 174)

The protocol published by the Attorney General is a high-level document which does not address the level of delegation of the Directors' particular functions, or arrangements for dealing with particular offences. It does mention that prosecuting lawyers exercise their powers regarding the institution and conduct of proceedings under the direction of their Director (paragraph 4.2). It also provides for consultation between the Directors and the Attorney in relation to cases of particular sensitivity and difficulty (section 4(d)). The Government is satisfied that arrangements for delegation put in place by the Directors will provide sufficient reassurance that decisions on cases will be taken at an appropriate level of seniority.

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[2] Protocol between the Attorney General and the Prosecuting Departments, July 2009 http://www.attorneygeneral.gov.uk/attachments/Protocol%20between%20the%20Attorney%20General%20and%20the%20Prosecuting%20Departments.pdf

[3] Government Response to the Report of the Joint Committee on the Draft Constitutional Renewal Bill (Cm 7690) July 2009 http://www.official-documents.gov.uk/document/cm76/7690/7690.pdf; The Government's Response to the Justice Committee Report on the Draft Constitutional Renewal Bill (provisions relating to the Attorney General) (Cm 7689), July 2009 http://www.official-documents.gov.uk/document/cm76/7689/7689.pdf

27. The transfer of consent to the Directors under clause 10 of the draft Bill does not extend to amending section 53 of the Serious Crime Act 2007, leading to an inconsistency in the draft Bill. We recommend that the Government address this anomaly in the forthcoming Bribery Bill (Paragraph 176)

The Government accepts this recommendation and has included provision amending section 53 in the revised Bribery Bill.

Article 5, OECD Convention

28. Article 5 of the Organisation for Economic Co-operation and Development's Convention must, at a minimum, be enshrined in guidelines applying to all prosecutors. Confidence in the criminal justice system will be undermined unless this important principle is both protected and respected. We recommend that the Attorney General take the earliest opportunity to ensure that this happens. (Paragraph 183)

Article 5 of the OECD Convention applies only to cases of bribery of a foreign public official. These cases are prosecuted by the Crown Prosecution Service and the Serious Fraud Office. The CPS has already issued internal guidance requiring compliance with Article 5, which is publicly available[4]. The SFO will also issue internal guidance.

Penalties

29. We support the penalties available under the draft Bill, including the power to impose unlimited fines on companies and a maximum ten year sentence of imprisonment for individuals. The draft Bill must have teeth. However, the Government must:

- **Clarify the way in which the unlimited fine will be assessed;**

[4] Legal Guidance – Bribery and Corruption
http://www.cps.gov.uk/legal/a_to_c/bribery_and_corruption/#P81_6729

- **Ensure that civil powers of confiscation and recovery will operate in a way that is proportionate and reasonable; and**
- **Take action at a European level to prevent companies being automatically and perpetually debarred following a conviction, while exploring shorter term measures to prevent disproportionate penalties being imposed in the meantime. The Government must ensure that the UK reaches a position where debarment is discretionary, if self-reporting is to work effectively in practice. (Paragraph 192)**

We welcome the Committee's support for the penalties proposed for the offences in the Bill. In the case of the unlimited fine, as with all fines, including those for existing corporate offences, the courts are required by law to ensure that the amount imposed reflects the seriousness of the offence and the circumstances of the case, including the known financial circumstances of the offender. We will consider whether it would be appropriate to ask the Sentencing Council to issue guidance on sentencing for bribery offences following the enactment of the Bribery Bill.

The exercise of confiscation powers is directed towards the recovery of all the proceeds of crime. It is not intended to be punitive in effect. We are satisfied that the courts will take into account all relevant information to ensure that the powers of confiscation operate in a reasonable and proportionate manner. It is a matter for the court to determine the benefit derived from an offence in any individual case.

The current EU Procurement Directive introduced mandatory debarment of suppliers convicted of specific offences, including corruption. This represented a strengthening of earlier Procurement Directives which only provided for optional exclusion by procurement authorities for these offences. A specialist Defence Procurement Directive agreed in January 2009 also makes reference to the treatment of suppliers convicted for corruption[5], with special clauses on security of

[5] See paragraph 65 of the Directive; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:216:0076:0136:EN:PDF

supply which will make sure that supplies to the armed forces will be delivered on time, in particular in times of crisis or armed conflict. Bribery is a serious offence and the Government considers it important that we work with our European partners to identify good practice in the application of exclusion procedures. We are considering whether a conviction for the proposed new corporate offence of failure to prevent bribery would trigger the conditions for automatic debarment.

The Security Services

30. We heard no persuasive evidence of a need for the domestic intelligence agencies to be granted an authorisation to bribe. Neither are we persuaded that this draft Bill is the appropriate vehicle to extend the security services' powers to contravene the criminal law. Finally, we note continuing doubt about whether clause 13 complies with the United Kingdom's international obligations, despite the fact that this issue was raised as long ago as 2003. For all these reasons we recommend that the Government remove clauses 13 and 14. (Paragraph 203)

We have reviewed the application of the Bill to the intelligence services following the Joint Committee's report. The Government is satisfied that some provision is required in the Bribery Bill to address those circumstances in which the intelligence services may have to use financial or other inducements to carry out their relevant statutory functions.

The Government notes that there are circumstances in which other authorities, for example the armed forces, may have to use financial or other inducements in the course of carrying out their functions which should also be reflected in the Bill. However, we have concluded that an authorisation scheme as proposed in clauses 13 and 14 of the draft Bill no longer represents the most appropriate solution taking into account the intended scope of the provision. The Bribery Bill that we are now publishing therefore includes a statutory defence for the conduct of the intelligence services, the armed forces and law enforcement agencies in so far as they are required to give financial or other advantages to carry out their relevant functions. This is modelled on a similar defence in respect of the offence related to indecent

images of children (section 1B of the Protection of Children Act 1978). We are confident that this provision complies with our international obligations.

Privilege

31. Under the provisions of the draft Bribery Bill, Members of both Houses of Parliament can be convicted of bribery. This is entirely proper: bribery is a very serious offence and Members should be subject to the same criminal laws as everyone else. (Paragraph 206)

32. In view of the importance of the freedoms parliamentary privilege is designed to protect, we believe that attempts to legislate on this matter should be consistent with each other. Clause 15 of the draft bill is based on the conclusions of the Joint Committee on the Draft Corruption Bill in 2003, which was not the case with the Parliamentary Standards Bill as introduced in the Commons. Inconsistency risks confusion in the operation and application of the law and could bring about the unnecessarily broad erosion of fundamental constitutional principles by means of competing precedents. For this reason we believe it is unacceptable that the draft Bribery Bill should take a different approach to privilege from that taken in the Parliamentary Standards Bill, particularly as the two bills deal with overlapping areas of law. (Paragraph 224)

33. In order to achieve consistency with the Parliamentary Standards Act 2009, we recommend that the Government leave out clause 15 of the draft Bribery Bill. (Paragraph 225)

34. The issue of parliamentary privilege has arisen in relation to several pieces of legislation and draft legislation in recent years. Legislating in a piecemeal fashion risks undermining the important constitutional principles of parliamentary privilege without consciousness of the overall impact of doing so. This issue was examined in considerable detail by the 1999 Joint Committee on Parliamentary Privilege, which concluded that a Parliamentary Privileges Act was required. We believe that, should the Government deem it

necessary, such an act would be the most appropriate place to address the potential evidential problems in relation to bribery offences. (Paragraph 228)

The Government is grateful for the Joint Committee's consideration of this difficult issue and fully recognises that the arguments for removing potential evidential problems in relation to the prosecution for a bribery offence of those protected by parliamentary privilege must be balanced against the need to uphold the freedoms that parliamentary privilege is designed to protect.

Given the sensitivities and complexities of this issue the Government has decided not to make provision in respect of parliamentary privilege in the Bill on Introduction. Members of both Houses will undoubtedly wish to raise the issue during the passage of the Bill and the Government will reflect carefully on the debate. We will continue to discuss the issues with the House Authorities.

Wider issues

35. The Government's partial Impact Assessment suggests that bribery legislation would only result in an additional 1.3 prosecutions for bribery per year. This would be an indicator of success if it reflected vastly increased diligence and compliance on the part of companies. We would be troubled if this low estimate were better explained by a lack of resources available to enforce the legislation. We recommend that the Government prepare a complete Impact Assessment for any legislation that is subsequently introduced, including an assessment of the additional resources required for effective enforcement by way of publicity, monitoring of compliance and investigations. Without committing adequate resources to tackle bribery, the Government's legislation will not have the required deterrent effect. (Paragraph 237)

36. The Government's impact assessment should also include a fuller analysis of the damage caused by bribery to economic and social development, to democracy and the rule of law, to individual members of the community and to businesses themselves, particularly through the distortion of competition, the diversion of scarce resources to purchase inferior

products, and the harm to personal and national reputations at home and abroad. These underlying economic and human costs, felt most directly and disproportionately by the poor, must not be overlooked. (Paragraph 238)

The Government is fully committed to providing adequate resources to tackle bribery effectively. There has already been a significant increase in the number of investigations into allegations of bribery since 2006. This is due to factors including new legal powers for the Serious Fraud Office, an ongoing increase in the number of SFO investigators working on bribery cases, and ring-fenced Government investment in dedicated police resources. Any additional resources required for prosecutions as well as other activities such as awareness-raising will be identified in the complete Impact Assessment, which we have published along with our revised Bribery Bill. In acknowledgement of the Committee's recommendation we have expanded the Impact Assessment so that it provides a fuller analysis of the wider damage caused by bribery.

37. The Government's partial Impact Assessment of the draft Bill leaves out much of the analysis needed to justify its conclusions and in particular takes only minimal account of the impact of the proposed legislation on the private sector. We recommend that the Government publishes a much more detailed Impact Assessment at the same time that the Bill is introduced into Parliament, taking account of all the points raised in Annex 1 to this report and paying particular attention to the impact of the legislation on business, especially small businesses. (Paragraph 242)

38. We welcome the commitment of the Government, set out in its partial Impact Assessment for the draft Bill, to review the impact of the legislation after a period of three to five years. We recommend, however, that in its revised Impact Assessment the Government generates a comprehensive set of performance indicators so that the criteria against which the legislation is being assessed are clearly understood. (Paragraph 244)

The Government welcomes the detailed analysis of the partial Impact Assessment provided in Annex 1 to the Committee's report, and we have taken these points into account in completing the Impact Assessment for our revised Bribery Bill. In

finalising the Impact Assessment we have worked with representatives of small, medium and large businesses in order to inform our assessment of the impact of the legislation.

We will review the impact of the legislation after a period of three to five years, by working closely with the relevant authorities to monitor investigations, prosecutions and convictions. In line with the new system we introduced last year for promoting the post-legislative scrutiny of Acts, we will also submit to the Justice Committee a Memorandum providing a preliminary assessment of key elements of implementation and operation of the legislation. We do not consider it appropriate to generate a broader set of performance indicators involving a monitoring process of compliance by companies, as our revised Bribery Bill will create mainstream criminal offences rather than regulations with which companies must comply. Such a monitoring process would involve taking a regulatory approach which we believe would impose an unnecessary burden on companies.

39. We regret that we were given a bare ten weeks to conduct pre-legislative scrutiny of this important draft Bill. We recommend that, in order to demonstrate its respect for the process, the Government ensure that future Joint Committees are established sufficiently promptly to allow for a minimum scrutiny period of twelve weeks from the first meeting of the committee appointed to undertake scrutiny. (Paragraph 246)

The Government is grateful to the Committee for carrying out scrutiny of the draft Bill to a challenging ten week timetable. The Government agrees that 12 weeks should be regarded as the norm for pre-legislative scrutiny and will try to provide a minimum of 12 weeks wherever possible.

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