
Response to the Law Commission Consultation Paper No.185

Reforming Bribery

March 2008

1. INTRODUCTION

- 1.1 The Fraud Advisory Panel (the “Panel”) is an independent body of volunteers drawn from the public and private sectors. The Panel’s role is to raise awareness of the immense social and economic damage that is caused by fraud and to help both the public and private sectors, and the public at large, to fight back.
- 1.2 Members of the Panel include representatives from the law and accountancy professions, industry associations, financial institutions, government agencies, law enforcement, regulatory authorities and academia. The Panel works to encourage a truly multi-disciplinary perspective on fraud.
- 1.3 The Panel was established in 1998 through a public-spirited initiative by the Institute of Chartered Accountants in England and Wales. Today, it is a registered charity and company limited by guarantee. The Panel is funded by subscription, donation and sponsorship.
- 1.4 The Fraud Advisory Panel welcomes the opportunity to respond to the Law Commission’s consultation paper on reforming the law of bribery.

2. THE PROBLEMS WITH THE CURRENT LAW

- 2.1 The Panel strongly believes that the law of bribery and corruption is fragmented, lacks clarity, is inconsistent in application and is in urgent need of reform.
- 2.2 Addressing the specific proposals that are set out in Part 12 of the Consultation Paper, the Panel wishes to make the following points –

3. A MODEL FOR BRIBERY

- 3.1 In the narrow context of a definition of “bribery” with which this Consultation Document is concerned, rather than the wider concept of “corruption”, we agree that, in the domestic

context, the law should draw no distinction between bribery in the public sector and bribery in the private sector.

- 3.2 We also agree that the model for the offence of bribery should be based on the conferring, promising, receipt or solicitation of an advantage in connection with an improper act performed or promised by or solicited from the recipient. However, in the interests of simplicity and to avoid the potential complications envisaged in paragraphs 4.54 – 4.59 of the Consultation Document, we are not persuaded that it is necessary to add as a separate offence the accepting of an advantage in breach of a duty not to accept it.

4. THE CONDUCT ELEMENT OF THE GENERAL BRIBERY OFFENCE

- 4.1 We would point out that the definition of “an improper act” should be read in conjunction and be contrasted with the definition of the offence of “fraud” in Sections 2 – 4 of the Fraud Act 2006. We are well aware that fraud, corruption and bribery often occur together in the commercial context. A prosecutor, faced with an allegation of the acceptance of an advantage obtained in circumstances where he has acted in breach of trust, may wish to charge bribery under the suggested proposals as well as a charge under Section 4 of the Fraud Act¹. In the absence of the inclusion of “dishonesty” as a concomitant of the offence of bribery, with which we agree, it appears that the bribery offence is much wider in scope than the offence of fraud by abuse of position in Section 4 of the Fraud Act 2006.
- 4.2 We are in general agreement that the definition of an “improper act” should not be extended to cover the breach of non-justiciable moral duties, as set out in paragraph 5.50 of the Consultation Document.

¹ **Fraud Act 2006. Section 4: Fraud by abuse of position**

- (1) A person is in breach of this section if he—
- (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
 - (b) dishonestly abuses that position, and
 - (c) intends, by means of the abuse of that position—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.
- (3) “Gain” includes a gain by keeping what one has, as well as a gain by getting what one does not have.

5. THE FAULT ELEMENT OF THE NEW BRIBERY OFFENCE

- 5.1 In relation to apportioning the degree of fault on the part of a “principal offender”, we express some doubt as to whether the Consultation Document is not placing too great a burden on the prosecutor to assess the mental element which has induced the recipient to act improperly by requiring the advantage to be “the primary reason” for his conduct. We would prefer the word “substantial” to be substituted for “primary”, which would be a more realistic hurdle for the prosecution to surmount.

6. DISCRETE OFFENCE OF BRIBING A FOREIGN PUBLIC OFFICIAL

- 6.1 We agree that the offence of bribing a foreign public official should be a separate offence and should be extended (paragraph 7.41) to inculcating a foreign official who accepts a bribe within England and Wales. We take cognisance of the reasons for not extending the offence of a bribing a foreign public official as set out in paragraphs 7.7 – 7.14 of the Consultation Document but would point out that in the experience of those of the Panel who have transacted much business overseas, the distinction between public and private undertakings has become blurred, as much state-owned business has become partially (some through a Public Private Partnership (PPI)) or fully privatised. We believe the arguments advanced for carving out private business transactions from the offence of bribing officials overseas unrealistic in this context and even though the applicable conventions do not seek to address bribery in the context of private business transactions, we would prefer that the new law take this into consideration.

7. DEFENCES, BARRIERS TO PROSECUTION AND ANCILLARY MATTERS

- 7.1 At first glance, it seemed to some members of the Panel unreasonable to exclude financial duress from the suggested proposal that the payer of a bribe should have a defence if he reasonably believed that he was under severe financial, as well as physical, duress. On reflection, we realised that this was an unrealistic proposition, giving a free hand to the defence of any person charged with paying bribes to secure a commercial contract, if he reasonably believed that a metaphorical gun was being held to his head and he would not be awarded the contract if he did not pay the bribe – a factor which is expressly excluded under the OECD convention.

7.2 We therefore agree with the provisional proposals made in paragraphs 8.14 and 8.31 of the Consultation Document that a defence should be available to a payer of a bribe who reasonably believed that he was in imminent danger of physical harm to himself or another and also that a defence should be similarly available where the payer reasonably believed that the conferring of an advantage was legally required, but not (paragraph 8.32) that to do so was legally permissible.

8. CORPORATE LIABILITY

8.1 The Panel concurs with the recommendation to defer any consideration of corporate liability until the wider review of corporate liability (paragraph 9.10) which the Panel urges the Law Commission to undertake without further delay. However we wish to emphasise that directors and managers of companies, while not necessarily directly involved in committing an offence of bribery, are responsible and accountable for other areas of corporate governance and have a duty to ensure that anti-bribery and anti-corruption policies and processes are implemented for the guidance of their employees.

8.2 A person who is charged with the offence (in a corporate context) would have a defence if his act or omission was due to a mistake, or to reliance on information given to him, or to an act or omission by another person or was due to some other cause beyond his control, and he had taken all reasonable precautions and had exercised all due diligence to avoid committing the offence. Both elements of the defence would have to be in place before the defence would be effective. The burden of satisfying the court that this defence has been met would fall on the individual raising it.

9. BRIBERY COMMITTED OUTSIDE ENGLAND AND WALES

9.1 We agree with the provisional proposals (11.54 and 11.57) that an act which if done in England and Wales would constitute a bribery offence should constitute the offence if done outside the UK by a national of the UK, a natural person resident in the UK and (11.57) by a body incorporated under the law of a Crown Dependency or an Overseas Territory.

9.2 We are also fully in agreement with the provisional proposals (paragraphs 11.59 – 11.78) relating to inchoate liability.