HOUSE OF LORDS

Select Committee on the Bribery Act 2010

Report of Session 2017–19

The Bribery Act 2010: post-legislative scrutiny

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Select Committee on the Bribery Act 2010

The Select Committee on the Bribery Act 2010 was appointed by the House of Lords on 17 May 2018 to consider and report on the Bribery Act 2010.

Membership

The Members of the Select Committee on the Bribery Act 2010 were:

Lord Empey
Baroness Fookes
Lord Gold
Lord Grabiner
Lord Haskel
Lord Hodgson of Astley Abbotts
Lord Hutton of Furness
Lord Plant of Highfield
Baroness Primarolo
Lord Saville of Newdigate (Chairman)
Lord Stunell
Lord Thomas of Gresford

Declarations of interests

See Appendix 1.

A full list of Members' interests can be found in the Register of Lords' Interests: http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests

Publications

All publications of the Committee are available at: https://www.parliament.uk/bribery-act-2010

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Further information

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Committee staff

The staff who worked on this inquiry were Michael Collon (Clerk), Ben Taylor (Policy Analyst), Alasdair Love (Clerk) and Rebecca Pickavance (Committee Assistant).

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Evidence is published online at http://www.parliament.uk/bribery-act-2010 and available for inspection at the Parliamentary Archives (020 7219 3074).

Q in footnotes refers to a question in oral evidence.

PRINCIPAL CONCLUSIONS AND OVERALL ASSESSMENT

The first attempt to put the common law offence of bribery on a statutory basis was in 1889. For many decades there has been agreement that the law was unclear and unsatisfactory, especially as regards offences committed by corporations, but there was agreement on little else. Eventually the Bribery Act 2010 was passed to put the offences on a fresh statutory basis. It has now been in force nearly eight years, and this Committee has been conducting post-legislative scrutiny to see whether the Act is achieving its intended purposes.

The view of our witnesses, with which we agree, is that the Act is an excellent piece of legislation which creates offences which are clear and all-embracing. At a time when much corruption is on a global scale, the new offence of corporate failure to prevent bribery is regarded as particularly effective, enabling those in a position to influence a company's manner of conducting business to ensure that it is ethical, and to take steps to remedy matters where it is not. The assessment of many of our witnesses is that the Act is an example to other countries, especially developing countries, of what is needed to deter bribery.

The Ministry of Justice Guidance is less successful in providing small and medium enterprises with the information and advice they need to enable them to decide on a formal anti-bribery policy. For companies considering exporting, the Guidance should give more assistance on the point at which hospitality exceeds what a reasonable member of the public might think was acceptable and begins to influence the recipient's course of action. The website of the Department for International Trade needs improvement. More should be done by local experts in UK embassies.

Smaller bribery cases, mainly domestic, are dealt with by the Crown Prosecution Service (CPS), while more complex cases, often with international implications, are the responsibility of the Serious Fraud Office (SFO). Police forces, the National Crime Agency, HMRC and other bodies are involved, as are agencies in Scotland. There has been criticism of lack of co-operation; this must be remedied. There has also been criticism of the slow pace of investigations, and the failure to update businesses and individuals on the progress of cases; improvements on these fronts should be made a priority by the SFO and the CPS.

We were also asked to look at deferred prosecution agreements because, although not derived from the Bribery Act, they have had a major influence on some of the largest recent cases of corporate corruption, allowing them to be settled without the companies involved being convicted of the offences. When, five years ago, the new regime began, there was some anxiety that it might be, or at least be seen to be, an easy way out, especially for large companies. We have looked at this carefully, and are satisfied that this is not the case. We believe that the discounts being applied to financial penalties are appropriate to encourage companies to self-report but not so large as to deprive the penalty of its effectiveness. We are also clear that a deferred prosecution agreement with a company is not, and cannot be, a substitute for the prosecution of any individuals involved in corrupt conduct.

The Bribery Act 2010: post-legislative scrutiny

CHAPTER 1: INTRODUCTION

1. Societies are built upon trust. They need to rely on those with power and influence using that power and exerting that influence with integrity and transparency. Any abuse of power, any improper influence, any action led by self-interest rather than the public interest, destroys that trust. Where this becomes the norm, democracy, the economy and the rule of law all suffer, and ultimately the fabric of society is at risk.

2. Corrupt societies often spring from the example given by corrupt governments, but small-scale corruption can be equally insidious. The first conviction under the Bribery Act 2010[1] was of Munir Patel, a junior court official who became known as willing, for a consideration, to erase driving convictions from the records of individuals. Eight other named individuals and a number of others were convicted of perverting the course of justice.[2]

3. The case of John Poulson provides an example of how small-scale bribery can, if unchecked, build up into a multi-million pound industry. Over 30 years Poulson, though not a qualified architect, starting with a £50 loan built up the largest architectural practice in Europe through the corrupt purchase of local government contracts in northern England, and of contracts for the re-development of major railway termini through bribery of a British Rail employee, Graham Tunbridge. The bribes involved were not always large. When Tunbridge became Estates and Rating Surveyor for BR Southern Region, he gave Poulson contracts for the redevelopment of London Waterloo, Cannon Street and East Croydon stations–all in return for £25[3] a week and the loan of a Rover car.

4. Such corruption breeds more corruption; it was estimated at Poulson's trial that 23 local authorities and over 300 individuals were involved. But the corruption had other deleterious effects. Taxpayers' money was misused in paying more than the contracts might have cost on an open public tender. The businesses which genuinely deserved to be awarded such contracts suffered. The public, who might have had buildings to admire, instead saw their city centres blighted by some of the worst examples of sixties brutalist architecture. Mercifully, most of the city centres of Newcastle and Leeds have since again been redeveloped, as has Cannon Street station; but some examples remain.

Constitution and terms of reference of the Committee

5. The importance of having a law of bribery which is clear, effective and robustly enforced is therefore not in doubt. As we explain in the following chapter, the applicable law in the United Kingdom has evolved over time and is now primarily contained in the Bribery Act 2010. However the task of the legislature is not just to make law, but to see whether major legislation it has

1 We also refer to this Act as the Bribery Act or, depending on the context, simply as the Act.
2 For further details see Chapter 3, para 61 and Box 1.
3 Approximately £500 in today's money. For the Cannon Street contract, he also received an £80 suit.

enacted is having the effect it was designed to achieve. This is the work of House of Lords Committees doing post-legislative scrutiny.

6. The timing of such scrutiny is important. When the House of Lords Constitution Committee first suggested in 2004 that major Acts of Parliament should routinely receive such scrutiny,[4] it suggested that this should take place three to six years after the entry into force of the Act. The Government, in its 2008 response,[5] suggested three to five years after Royal Assent, and this is still the Government's position.[6] This is a significant difference, since major primary legislation often cannot enter into force before secondary legislation has been made, which can take a year or more.

7. The Bribery Act 2010 received Royal Assent on 8 April 2010 but did not come into force until 15 months later, on 1 July 2011. The House of Lords Liaison Committee first considered setting up a Committee for post-legislative scrutiny of the Act in February 2017, but thought this was too soon and postponed the scrutiny for a year. It took into account that the law governing criminal activity will be that in force at the time of that activity, so that even then there were still cases coming before the courts which involved the earlier legislation;[7] no case on the interpretation of the Bribery Act has yet reached the Court of Appeal,[8] let alone the Supreme Court.

8. It was not therefore until March 2018 that the Liaison Committee decided to recommend the setting up of a Committee for post-legislative scrutiny of the Bribery Act.[9] The House accepted that recommendation, and this Committee was set up on 17 May 2018. The names of the members and the declarations of interest are listed in Appendix 1.

9. The Liaison Committee recommended that this Committee should in particular consider:

    - whether the Act has led to a stricter prosecution of corrupt conduct, a higher conviction rate, and a reduction in such conduct;

    - whether, as the CBI and others warned, UK business have been put at a competitive disadvantage in obtaining foreign contracts because

4 Constitution Committee, *Parliament and the Legislative Process* (14th Report, Session 2003–04, HL Paper 173-I)

5 Office of the Leader of the House of Commons, *Post-legislative scrutiny :The Government's Approach*, Cm 7320, March 2008, Appendix, paragraph 16: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228516/7320.pdf [accessed 4 March 2019]

6 Cabinet Office, *Guide to Making Legislation*, July 2017, para 43.5: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645652/Guide_to_Making_Legislation_Jul_2017.pdf [accessed 4 March 2019]

7 For example, the conviction in September 2016 of Ronald Harper and others for corruptly making and receiving payments for contracts for work for the Royal Household related to payments made before July 2011; the charges were conspiracy to make corrupt payments and fraud by abuse of position.

8 Munir Patel appealed against his six-year prison sentence, which was reduced to four years. On the other hand, on 15 January 2016 the Court of Appeal ruled on the application of the Prevention of Corruption Act 1906 (repealed) to the bribery of a foreign official, agent or principal of a foreign public body, confirming that the meaning of the words 'agent' and 'principal' included both foreign and domestic persons or organisations and that the extension of extraterritoriality introduced by section 108 of the Anti-Terrorism, Crime and Security Act 2001 (and in force from 14 February 2002) only confirmed the existing position and was enacted out of an abundance of caution to address concerns expressed by the OECD in their 1999 review about the clarity of the earlier legislation (*R v AIL, GH and RH* [2016] EWCA Crim 2): http://www.bailii.org/ew/cases/EWCA/Crim/2016/2.html [accessed 23 January 2019]

9 Liaison Committee, *New ad hoc Committees in 2018–19* (2nd Report, Session 2017–19, HL Paper 103) paras 24-33

conduct which was lawful under equivalent foreign legislation might be unlawful under the stricter provisions of the Bribery Act;

- whether small and medium enterprises (SMEs) were sufficiently aware of the provisions of the Act.

10. Additionally, the Liaison Committee specifically invited us to consider Deferred Prosecution Agreements (DPAs) as they affect bribery. DPAs are, as we explain in Chapter 7, the creation of the Crime and Courts Act 2013, and apply to many crimes other than bribery, but to date their main application has been to bribery offences. We were asked to investigate how DPAs have affected the conduct of companies both to prevent corrupt conduct, and in the investigation of such conduct once it is discovered to have occurred.

11. Only one of the Acts which have previously been subject to post-legislative scrutiny by a Lords Committee has extended to Scotland,[10] and Committees have only been able to suggest that the Scottish Parliament should consider their recommendations in relation to Scotland. The Bribery Act extends to the whole of the United Kingdom. All the relevant law of Wales and Northern Ireland is the same as the relevant English law, but there are material differences with the law applicable in Scotland. We consider the position of Scotland in Chapter 9. The recommendations we make for amendment of the Bribery Act will extend to Scotland, but there are other suggestions we make for changes to Scottish law and practice which are devolved matters and which it will therefore be for the Scottish Government to consider.

Our working methods

12. Under the Government's own rules[11] the Ministry of Justice, which is the sponsor department for the Bribery Act, should have submitted a memorandum no later than April 2015. By the time this Committee was set up, three years later, it had still not done so. We requested a memorandum, and it was laid before Parliament in June 2018.[12] We do not regret the delay, since it enabled the department to give us a more up-to-date assessment than if it had followed its own rules.

13. We held our first meeting on 12 June 2018. On 19 June we agreed a Call for Evidence[13] which was circulated widely. We received evidence from 108 persons and bodies. We have received supplementary written evidence from 15 persons and bodies. On 26 June we held an informal seminar off the record at which we heard from a number of experts. Their views at the outset of our inquiry were extremely valuable.

14. Between 3 July and 11 December 2018 we held oral evidence sessions every week the House was sitting. In those 23 sessions we heard oral evidence from 52 witnesses. A list of those who gave us written and oral evidence is at Appendix 2, and their evidence is on our website. To all those witnesses we are most grateful; our assessment of their views is the basis of this report.

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10 The Inquiries Act 2005. See Report of the Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: post-legislative scrutiny* (Report of Session 2013–14, HL Paper 143)

11 See paragraph 6 above.

12 Ministry of Justice, *Bribery Act 2010: Post Legislative Scrutiny Memorandum*, Cm 9631, June 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf [accessed 23 January 2019]

13 See Appendix 3.

Acknowledgement

15. Throughout the course of the inquiry we have been fortunate to have as our specialist adviser Anne-Marie Ottaway, a solicitor whose work, first at the Serious Fraud Office and more recently in private practice, made her admirably qualified to assist us. We are most grateful to her for her important contribution to our work.

CHAPTER 2: BACKGROUND TO THE LEGISLATION

16. Few Acts of Parliament can have had as long and painful a gestation as the Bribery Act.

The first Prevention of Corruption Acts

17. Until 1889 bribery was solely a common law offence[14]—or, more accurately, a number of different common law offences, distinguished by the office or function to which the offence applied. There were other relevant common law offences including embracery (bribery of a juror) which is no longer extant,[15] and misconduct in public office, an offence which is still thriving and perhaps even enjoying a revival, something we consider in Chapter 3. And, Scottish common law being different from English common law, the Scottish offence of bribery was different still.

18. The Public Bodies Corrupt Practices Act 1889 was passed to implement the recommendations of a Royal Commission which had inquired into the Metropolitan Board of Works, which then exercised the powers of local government in London. The Act created for the first time the statutory offences of corruptly soliciting or receiving, or corruptly giving, promising or offering, any "gift, loan, fee, reward or other advantage". The Act applied only to local public bodies such as county, city, town or borough councils. It extended to Scotland.

19. Following calls for the criminal law of corruption to be extended to the private sector, the Prevention of Corruption Act 1906 was passed. This created the offences of an agent corruptly accepting or obtaining "any gift or consideration" as an inducement or reward in relation to his principal's affairs or business; or for a person corruptly giving or agreeing to give "any gift or consideration" as an inducement or reward in relation to his principal's affairs or business. This applied to all agents whether in the public or private sector, and included "a person serving under the Crown". The Acts thus used different language to describe the "gift or consideration". Neither Act defined the vital word "corruptly". Some conduct could be both a common law and a statutory offence, or an offence under both Acts.

20. The last Act of the trio, the Prevention of Corruption Act 1916, created no new offences but shifted the burden of proof in relation to public sector contracts, so that where in proceedings under the 1889 or 1906 Acts "it is proved that any money, gift or other consideration has been paid or given to or received by a person in the employment of His Majesty or any Government Department or a public body" for procuring a contract, it was for the defence to show that the payment was not corrupt. These three Acts[16] were for the next century the main statutory provisions governing bribery.[17]

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14 If one excludes the Sale of Offices Act 1551 (repealed) and the Sale of Offices Act 1809.

15 Abolished by section 17(1)(a) of the Bribery Act 2010.

16 These three Acts can be cited collectively as the Prevention of Corruption Acts 1889 to 1916: see section 4(1) of the Prevention of Corruption Act 1916.

17 Specific offences of bribery were created by the Honours (Prevention of Abuses) Act 1925; the Licensing Act 1964, section 178; the Criminal Law Act 1967, section 5; the Local Government Act 1972, section 117(2); the Customs and Excise Management Act 1979, section 15; and the Representation of the People Act 1983, sections 107, 109 and 111–115.

The late twentieth century

21. The fifties and sixties were years when corruption was perceived as increasingly prevalent, especially in local government. In 1973 a Committee was appointed under Lord Redcliffe-Maud:

> "To examine existing local government law and practice and how it might affect:
>
> (i) the conduct of both members and officers in situations where there is or could be a conflict between their position in local government and their private interests;
>
> (ii) qualification or disqualification for service as a member of a local authority or any of its committees.
>
> To consider the adequacy of the operation of such law and practice and the principles which should apply, and make recommendations regarding compliance with such principles."

22. The Committee reported in 1974, and among its recommendations were that section 2 of the 1916 Act should be amended so as to apply (a) to exercises of discretionary powers by local authorities as well as to the award of contracts, and (b) to councillors as well as to employees; and that section 2 of the 1889 Act should be amended so as to give the court discretion to disqualify a person convicted of corruption from membership of a local authority for life on a first offence. Yet almost before the Committee's report could be considered, matters came to a head with the conviction of John Poulson in March 1974. This led the Prime Minister to set up the Royal Commission on Standards of Conduct in Public Life under Lord Salmon. Its terms of reference were:

> "To enquire into standards of conduct in central and local government and other public bodies in the United Kingdom in relation to the problems of conflict of interest and the risk of corruption involving favourable treatment from a public body; and to make recommendations as to the further safeguards which may be required to ensure the highest standard of probity in public life."

23. The Royal Commission reported in July 1976, and among its recommendations were the amendment and consolidation of the Prevention of Corruption Acts 1889 to 1916. In relation to the public sector the Commission recommended:

> "(i) that the essence of the offence of bribery should remain the corrupt offering, giving, soliciting or accepting of considerations as an inducement or reward in respect of the affairs of the organisation in question;
>
> (ii) that public bodies should be defined as broadly as is compatible with certainty; and
>
> (iii) that the presumption of corruption should remain, and should apply whether or not contracts are involved in the alleged offence."

24. Although the Royal Commission was examining only the public sector, it expressed the expectation "that the opportunity will be taken of considering what, if any, changes are needed in the application of the present legislation to

the private sector". That expectation was not realised. The opportunity was not taken by the Government to make any changes in the law in either the public or the private sector, and matters remained unchanged for nearly 20 years. Then in October 1994, 20 years after the Salmon Royal Commission was set up in response to the Poulson scandal, the Prime Minister in response to the many allegations of "sleaze"—Members of Parliament accepting cash for questions, and Ministers accepting personal favours in conflict with their duties—set up the Standing Committee on Standards in Public Life[18] under the chairmanship of Lord Nolan.

25. In considering the conduct of Members of Parliament, the Nolan Committee said in their first report[19] that doubts existed whether, in the case of bribery of a Member or acceptance of a bribe by a Member, the courts or Parliament had jurisdiction. The report continued:

> "The Salmon Commission in 1976 recommended that such doubt should be resolved by legislation, but this has not been acted upon. We believe that it would be unsatisfactory to leave this issue outstanding when other aspects of the law of Parliament relating to conduct are being clarified. **We recommend that the Government should now take steps to clarify the law relating to the bribery of or the receipt of a bribe by a Member of Parliament.**[20] This could usefully be combined with the consolidation of the statute law on bribery which Salmon also recommended, which the government accepted, but which has not been done. This might be a task which the Law Commission could take forward."[21]

26. The "doubt" which instigated this work was the one matter which was not and still has not been resolved by legislation: although it is now clear that a Member of either House will be subject to the criminal law of bribery in the same way as a non-member, there is no statutory provision to this effect, nor any demarcation line with Parliamentary privilege.[22] However "the consolidation of the statute law on bribery", which the Nolan Committee regarded as an adjunct to the specific issue of bribery of Members of Parliament, was as the Committee recommended referred by the Government to the Law Commission.

The Law Commission's work

27. Even before the Nolan Committee's recommendation, the Law Commission had in 1994 begun a comprehensive review of the law of dishonesty. Initially they sought to make their review of the law of bribery part of this larger

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18 Lord Stunell, a member of this Committee, is also a member of the Committee on Standards in Public Life.

19 Committee on Standards in Public Life, *First Report of the Committee on Standards in Public Life*, Cm 2850-I, May 1995, para 2.103: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336919/1stInquiryReport.pdf [accessed 16 January 2019]

20 Emphasis in the original.

21 Committee on Standards in Public Life, *First Report of the Committee on Standards in Public Life*, Cm 2850-I, May 1995, para 2.104: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336919/1stInquiryReport.pdf [accessed 16 January 2019]

22 Nor has the possibility of parliamentary privilege being invoked to prevent evidence being given in support of prosecutions been resolved, since clause 15 of the draft Bribery Bill, which would have dealt with this, was withdrawn by the Government on the recommendation of the Joint Committee on the Draft Bribery Bill on the ground that a piecemeal reform of parliamentary privilege was undesirable: see Joint Committee on the Draft Bribery Bill, *Draft Bribery Bill* (First Report, Session 2008–09, HC 430-II, HL Paper 115-I), Chapter 13.

project, but they soon came to see corruption as a distinct crime deserving special treatment. In 1997 they published a Consultation Paper *Legislating the Criminal Code: Corruption*,[23] and this was followed in 1998 by their first report, also entitled *Legislating the Criminal Code: Corruption*.[24] Appended to the Report was a draft Corruption Bill. Central to it was the definition of "corruptly" which was spread over three lengthy and complex clauses; this was ultimately to prove the Bill's downfall.

28. On receiving the report the Government set up a working group of stakeholders which met over the period 1998–2000, and this was followed in June 2000 by a Government White Paper on corruption.[25] This was positively received and led to the publication in 2003 of a draft Corruption Bill.[26] That draft Bill was closely based on the Law Commission's draft of five years earlier, including the definition of "corruptly", with only a re-arrangement of the order of the clauses. A number of provisions were added, including a clause requiring the consent of the Attorney General to the initiation of prosecutions, two clauses providing exemptions for the intelligence services, and provisions extending the Bill to Scotland and Northern Ireland, something beyond the powers of the Law Commission whose remit is confined to England and Wales.

29. That draft Bill was sent to a Joint Committee of both Houses for pre-legislative scrutiny. In their report, published on 31 July 2003,[27] the Committee accepted that the existing law on corruption was so deficient that it was necessary to legislate, but said:

> "The written and oral evidence we have received has been highly critical of the Bill from a wide range of different viewpoints. While no one has challenged the need for new legislation, there have been many adverse comments on the approach adopted in the Bill and its drafting, clarity and comprehensibility."[28]

30. The Joint Committee shared the views of the witnesses, and were particularly critical of the retention of the agent/principal relationship as the basis for the offence. They felt that the Bill did not state what type of conduct was punishable as corrupt in language which could be readily understood by the police, by prosecutors, by jurors, by the public, and especially by the business community and public sector. They invited the Home Office to bring forward a revised Bill taking account of all their criticisms.

31. In its response,[29] the Government accepted the Joint Committee's recommendations in part but expressed reservations about the suggestions as

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23 Law Commission, *Legislating the Criminal Code*, CP145 (1997): http://www.lawcom.gov.uk/app/uploads/2015/04/c145-Corruption.pdf [accessed 16 January 2019]

24 Law Commission, *Legislating the Criminal Code: Corruption*, Report No. 248 (2 March 1998): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235565/0524.pdf [accessed 5 March 2019]

25 Home Office, *Raising Standards and Upholding Integrity: the Prevention of Corruption*, Cm 4759, June 2000: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/260777/4759.pdf [accessed 4 March 2019]

26 Home Office, *Corruption: Draft Legislation*, Cm 5777, March 2003: https://www.scl.org.uk/sites/default/files/draftCorruptionBill.pdf [accessed 5 February 2019]

27 Joint Committee on the Draft Corruption Bill, *Draft Corruption Bill* (Report ofSession 2002–03, HC 705, HL Paper 157)

28 *Ibid*, para 18

29 Secretary of State for the Home Department, *The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill*, Cm 6086, December 2003: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/251042/6086.pdf [accessed 4 March 2019]

to how the offences should be structured, given the rejection of the principal/agent model. After further consultation the Government concluded that, although there remained support for reform, there was no clear consensus on the form it should take. It therefore decided to refer the matter back to the Law Commission for a further review.

32. The Law Commission issued a second consultation paper, *Reforming Bribery,*[30] on 29 November 2007, 10 years after the first. This time their focus was on "corruption in the narrow sense of offences relating to bribery." They regarded broader offences of corruption such as insider dealing, and certain offences against competition law as outside the scope of their project, and therefore entitled the project "bribery" rather than "corruption".[31] The consultation paper was again followed by a report[32] with, appended to it, a draft Bribery Bill.

The draft Bribery Bill

33. On 25 March 2009 the Government presented to Parliament a draft Bribery Bill[33] which closely followed the Bill appended to the Law Commission's report. Again this was referred to a Joint Committee of both Houses for pre-legislative scrutiny.[34] Their report was published on 28 July 2009.[35] This Joint Committee was as supportive of the draft Bribery Bill as its predecessor six years earlier had been critical of the draft Corruption Bill. The Committee thought that the proposed offences of bribing and being bribed overcame the hurdle—the meaning of "corruptly"—which had defeated the draft Corruption Bill. They "particularly welcome[d] the proposed offence that targets companies and partnerships which fail to prevent bribery by persons performing services on their behalf"—what is now section 7 of the Act.

34. The Bill was introduced in the House of Lords on 19 November 2009. It received all-party support. We deal in the appropriate places in this report with those matters which then caused controversy, and still do.[36] The Bill received Royal Assent on 8 April 2010, the day Parliament was dissolved for the general election.

35. Section 9 of the Act requires the Secretary of State to publish guidance about the procedures that commercial organisations can put in place for the purposes of establishing an "adequate procedures" defence to the section 7 offence. During the passage of the Bill the (Labour) Government had given an undertaking that the Act would not be brought into force until at least three months after that guidance had been published.[37] In fact the Coalition

30 Law Commission, *Reforming Bribery: A Consultation Paper*, CP185 (2007): http://www.lawcom.gov.uk/app/uploads/2015/03/cp185_Reforming_Bribery_consultation.pdf [accessed 5 March 2019]

31 *Ibid.*, paras 1.2–1.3

32 Law Commission, *Reforming Bribery* (Report No. 313) (19 November 2008): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/231183/0928.pdf [accessed 4 March 2019]

33 Ministry of Justice: *Bribery Draft Legislation*, Cm 7570, March 2009: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238651/7570.pdf [accessed 4 March 2019]

34 Two members of our Committee, Lord Grabiner and Lord Thomas of Gresford, were members of the Joint Committee.

35 Joint Committee on the Draft Bribery Bill, *Draft Bribery Bill* (First Report, Session 2008–09, HC 430, HL Paper 115–I)

36 For the wording of section 7 (failure of commercial organisations to prevent bribery) see Chapter 6; for consent to prosecution (section 10) see paras 94–101; for defences of the intelligence services (section 13) see paras 62–67.

37 Undertaking by Claire Ward MP, Parliamentary Under-Secretary of State for Justice, Commons Committee 4th sitting, 18 March 2010, col 151.

Government did not publish the Guidance until March 2011, and it was not until 1 July 2011, just 35 years after the recommendation of the Salmon Royal Commission, and 95 years after the enactment of the Prevention of Corruption Act 1916, that the Bribery Act 2010 was brought into force.

The Bribery Act: an overall assessment

36. However well received a Bill may be, it does not necessarily follow that the resulting Act will live up to the expectations and achieve what was hoped. The Post Legislative Scrutiny Memorandum modestly concludes: "The Government's preliminary assessment is that the Bribery Act has fulfilled the functions that Parliament intended it to perform in the seven years since it became law."[38] Others agree, but are rather more forthcoming. Of the 100 witnesses from whom we have received written evidence or taken oral evidence, not one has had major criticisms to make. There have of course been many suggestions for ways in which it might be improved, and we deal with these in this report. But overall the structure of the Act, the offences it created, its deterrent effect, and its interaction with deferred prosecution agreements, are only some of the aspects which have been almost universally praised.

37. These are only some of the overall assessments of the Act we have received:

- Baker McKenzie: "In many ways, the UKBA is seen as the gold standard for bribery legislation around the world."[39]
- Nathan Jensen and Edmund Malesky: The Act is "an exemplary version of exactly the type of legislation that is effective in deterring extraterritorial bribery in developing countries."[40]
- Deloitte: "The Act remains a lodestar for other countries in updating their own legislation … "[41]
- Transparency International: "The Bribery Act has set a new higher standard for business and governments globally … governments around the world look to the Bribery Act when considering their own legislative reforms."[42]
- Philip Bramwell, General Counsel, BAE Systems plc: "It is a very good statute that is recognised as such internationally."[43]
- Mark Gregory, General Counsel, Rolls-Royce plc: "We would consider the Bribery Act to be the high-water mark."[44]
- Phil Mason, Senior Anti-Corruption Adviser, DfID: "The Bribery Act is a precious asset for the UK".[45]

38. **The first draft Corruption Bill was subject to scathing criticism, and the Government did not proceed with it. The draft Bribery Bill, by contrast, has resulted in an Act which has been much praised. Our recommendations deal mainly with the implementation and enforcement of the Act.**

38 Ministry of Justice, *Bribery Act 2010: Post Legislative Scrutiny Memorandum,* Cm 9631, June 2018, para 135: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf [accessed 23 January 2019]
39 Written evidence from Baker McKenzie (BRI0030)
40 Written evidence from Nathan Jensen and Edmund Malesky (BRI0004)
41 Written evidence from Deloitte (BRI0033)
42 Written evidence from Transparency International UK (BRI0003)
43 Q 63 (Philip Bramwell)
44 Q 69 (Mark Gregory)
45 Q 128 (Phil Mason)

CHAPTER 3: THE OFFENCES OF BRIBERY AND BEING BRIBED (SECTIONS 1 AND 2)

The offences

39. As detailed in the previous chapter, one of the primary objectives of the Bribery Act was to reform and update bribery and corruption legislation, and sections 1 and 2 of the Act represent one aspect of this reform, moving away from a principal/agent model. Instead, they created the crimes of giving and receiving bribes.

40. The offence of bribery is described in section 1 as occurring when a person offers, gives or promises to give a "financial or other advantage" to another individual in exchange for "improperly" performing a "relevant function or activity". Section 2 covers the offence of being bribed, which is defined as requesting, accepting or agreeing to accept such an advantage, in exchange for improperly performing such a function or activity. The "relevant function or activity" element is explained in section 3—it covers "any function of a public nature; any activity connected with a business, trade or profession; any activity performed in the course of a person's employment; or any activity performed by or on behalf of a body of persons whether corporate or unincorporated". Section 1, 2 and 6 offences carry the same maximum penalties of up to 10 years imprisonment and/or an unlimited fine for individuals, and an unlimited fine for a company.

41. The Act has a very broad territorial scope, which has implications for businesses in or associated with the UK. The jurisdictional scope of the offences in sections 1, 2, 6 and 7 covers acts of bribery (or the failure to prevent bribery) which took place partly, or even entirely, outside the UK, provided that the alleged perpetrator is a British citizen or deemed to have a "close connection" with the UK. This includes citizens of British Overseas Territories and companies incorporated in the UK. This aspect of the law is largely in accordance with pre-existing bribery legislation,[46] and the only significant extension is that the Act now also includes foreign nationals who are ordinarily resident in the UK.

Prosecutions

42. We heard a range of views as to whether the Act was being adequately enforced. A number of witnesses highlighted the generally positive assessment of the UK by the Organisation for Economic Co-operation and Development (OECD), and Transparency International's assessment of the UK as one of the few "active enforcers" of the OECD Anti-Bribery Convention, alongside the United States, Germany and Switzerland.[47] However, it should be noted that the OECD Convention applies primarily to the enforcement of foreign bribery cases, and is less concerned with domestic cases of bribery.

43. Other witnesses argued that, given the paucity of data in this area, it was very difficult to say whether bribery was being investigated and prosecuted at a rate commensurate with actual offences. Dr Lord noted the difficulties of

46 The scope of UK bribery law was first extended by sections 108–110 (now repealed) of the Anti-terrorism, Crime and Security Act 2001, which was intended to bring the UK into compliance with the 1997 OECD Anti-Bribery Convention.

47 Compared with five signatories who were judged to be moderate enforcers, eight with little enforcement, and 22 with "little or no enforcement". Written evidence from Monty Raphael QC (BRI0016), Control Risks (BRI0014), Edmund Malesky and Nathan Jensen (BRI004), Dan Hough (BRI0021).

determining the level and type of offences under the Act, given the absence of a specific category in the Office for National Statistics recorded crime data, and the apparent discontinuation of the Public Sector Corruption Index, which required all forces to report allegations of corruption to the Metropolitan and City Police Company Fraud Branch.[48] Data on bribery seems to be inconsistently recorded across police forces and courts, and no publicly available source of data on prosecutions and convictions under the Bribery Act appeared to have been collated until we ourselves requested this data at the start of our inquiry.

44. Further complicating factors include the long duration of many bribery investigations (dealt with below), which means that long after the Bribery Act came into force, a majority of bribery-related cases are still being prosecuted under earlier laws. Indeed, between 2014 and the second quarter of 2018, the CPS has launched 107 proceedings under the Prevention of Corruption Act 1906, compared with around 42 for all offences under the Bribery Act.[49]

45. According to one academic analysis of police statistics, 25 police forces in England, alongside the Ministry of Defence Police and Serious Fraud Office (SFO), have recorded 138 cases over a six-year period (fewer than 23 a year on average), with a large proportion handled by a small number of forces, while a significant minority of forces have never handled a bribery case under the Bribery Act. This is in line with previous trends prior to the Act; Dr Nicholas Lord cited research which suggests that the number of cases handled under bribery legislation "shows no significant increase or decrease since 1964".[50]

46. As can be seen in the figures below, there is a low rate of cases proceeded with under section 1 and 2 of the Bribery Act; this, as is the case with most crimes, is considerably lower than the number of cases investigated by police for a variety of reasons.[51]

Table 1: Defendants proceeded against at magistrates' courts and found guilty and sentenced at all courts, for offences under Section 1 of the Bribery Act 2010, England and Wales, 2011 to 2017

Outcome	2011	2012	2013	2014	2015	2016	2017
Proceeded against	1	1	4	2	2	5	7
Found guilty	-	1	2	2	2	4	3
Sentenced	-	1	2	2	2	4	3
Of which							
Absolute discharge	-	-	-	-	-	-	-
Conditional discharge	-	-	-	-	-	-	-
Fine	-	-	-	-	-	-	
Community sentence	-	-	-	-	-	1	-

48 Written evidence from Dr Nicholas Lord (BRI0019)
49 Supplementary written evidence from Nicola Hewer and Michelle Crotty (BRI0049)
50 Written evidence from Dr Nicholas Lord (BRI0019)
51 These can include insufficient evidence or evidential difficulties, a lack of suspects, pending decisions, a victim or witness withdrawing their support, or a case being proceeded against under alternative charges (for example, fraud or misconduct in public office).

Outcome	2011	2012	2013	2014	2015	2016	2017
Suspended sentence	-	1	-	-	-	-	2
Immediate custody	-	-	2	2	2	3	1
Otherwise dealt with	-	-	-	-	-	-	-
Compensation	-	-	-	-	-	-	-

Source: Ministry of Justice, Bribery Act 2010: Post Legislative Scrutiny Memorandum, Cm 9631, June 2018[52]*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf [accessed 4 March 2019]*

Table 2: Defendants proceeded against at magistrates' courts and found guilty and sentenced at all courts, for offences under section 2 of the Bribery Act 2010, England and Wales, 2011 to 2017

Outcome	2011	2012	2013	2014	2015	2016	2017
Proceeded against	-	-	2	1	-	1	9
Found guilty	-	1	1	5	1	-	6
Sentenced	-	1	1	5	1	-	5
Of which							
Absolute discharge	-	-	-	-	-	-	-
Conditional discharge	-	-	-	-	-	-	-
Fine	-	-	-	-	-	-	-
Community sentence	-	-	-	1	-	-	-
Suspended sentence	-	-	-	-	1	-	4
Immediate custody	-	1	1	4	-	-	1
Otherwise dealt with	-	-	-	-	-	-	-
Compensation	-	-	-	-	-	-	-

Source: Ministry of Justice, Bribery Act 2010: Post Legislative Scrutiny Memorandum, Cm 9631, June 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf *[accessed 4 March 2019]*

47. There are a number of factors which explain why the number of prosecutions has been low. As previously noted, bribery has historically been prosecuted at a relatively low rate, and there are inherent difficulties in detecting a crime in which victims may well be unaware that an offence has been committed against them. In practice, most cases of bribery appear to be detected only if the crime is unsuccessful (as, for example, when a bribe is rejected and the attempt is then reported to police), when a whistle-blower, often at substantial personal risk, reports suspicious occurrences within their own organisation, or when a company self-reports. As Commander Baxter made clear:

> "it is a very private offence, where those offering the bribe and those receiving it are completely satisfied with that arrangement. Therefore,

52 The number of defendants found guilty in a particular year may exceed the number proceeded against as the proceedings in the magistrates' court took place in an earlier year and the defendants were found guilty at the Crown Court the following year; or the defendants were found guilty of a different offence to that for which they were originally proceeded against. This also applies to Table 2.

> the victim, who is generally in another business or a member of the public, is often unaware that the bribe and an offence has taken place."[53]

48. Suspicious Activity Reports (SARs) offer an additional tool for detecting bribery. This system requires certain businesses and individuals to submit reports to the NCA if they know or suspect that a person may be engaged in money laundering or dealing in criminal property. While not specifically concerned with the detection of bribery, as a formalised mechanism mandating the reporting of intelligence relating to financial crime, they could assist in this area. Indeed, when the CEO of Skansen self-reported an act of bribery to the City of London Police, he also submitted a SAR to the NCA.[54] However, Pinsent Masons were critical of their use for these purposes to date, explaining that:

> "In our experience, suspicious activity reports to the National Crime Agency ("NCA") concerning suspicions of bribery that arise in the context of corporate transactions rarely result in any form of follow up investigation by the police or other agencies, although we understand there have been a number of enhancements in how this intelligence gathering is disseminated across agencies."[55]

49. This is supported by the NCA's annual report on SARs for 2018, which states that the 22,619 Defence Against Money Laundering (DAML) SARs (a form of pre-clearance, in which permission is requested from the NCA to proceed with a deal which the requestor suspects could have money laundering implications), resulted in only 40 arrests, across 28 cases, and £51,907,067 in money prevented from going to suspected criminals.[56] There was a 20% increase in the number of DAML SARs compared with the previous year. In total 463,938 SARs were received by the NCA between April 2017 and March 2018, which was an increase of 10% on the previous year.

50. When we asked the NCA what role SARs played in the detection of bribery, and how many cases had been detected in this way, Donald Toon, the Director of Prosperity (Economic Crime and Cyber Crime) at the National Crime Agency, confirmed that they provide a "valuable source of intelligence for law enforcement agencies", and that they contribute to tackling "a range of threats, including bribery".[57] However, he did not provide any figures or examples of situations in which an incident of bribery had been detected through the SARs regime.

Reporting mechanisms

51. Evidence suggests that the means for reporting bribery offences to police are not always clear. As the City of London Police informed us, there is "no single law enforcement or intelligence body within England and Wales [which] leads on routinely receiving information relating to bribery and corruption activity", and it is "not clear to the public who corruption and bribery should be reported to".[58]

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53 Q 106 (Commander Karen Baxter)
54 Written evidence from Ian Pigden-Bennett (BRI0053). See Chapter 6, para 220, Box 4.
55 Written evidence from Pinsent Masons LLP (BRI0041)
56 National Crime Agency, *Suspicious Activity Reports (SARs) Annual Report 2018* (December 2018): http://www.nationalcrimeagency.gov.uk/publications/suspicious-activity-reports-sars/992-2018-sars-annual-report/file [accessed 12 February 2019]
57 Supplementary written evidence from Donald Toon, NCA (BRI0061)
58 Written evidence from City of London Police (BRI0022)

52. No single centralised mechanism exists for reporting bribery offences (although there are means to report online through the SFO and NCA websites),[59] as there is with fraud through Action Fraud, which may contribute to the low rates of prosecutions. As Commander Baxter of the City of London Police, who help to run Action Fraud, explained, they "have learned much from being the lead force on Action Fraud", including the various risks and issues associated with it.[60] They emphasised that, while the system helps them to investigate cases, it also provides a wealth of intelligence with which they can actively help businesses better protect themselves against these crimes in the first place. She noted that while they had recently applied to the Home Office for £1.2 million in order to extend the Action Fraud database and reporting mechanisms to include bribery and corruption, this bid was not successful.

53. The Home Office has however committed to launching a new reporting mechanism for allegations of bribery and corruption, in line with the Government's Anti-Corruption Strategy, and is currently investigating the options. The Government's first annual update on its Anti-Corruption Strategy, published in December 2018, describes this as an ongoing commitment, with scoping work having been undertaken during the course of the year.[61]

54. **We commend the Home Office's decision to look at options for a centralised reporting mechanism for bribery.**

Alternative offences

55. Bribery may also be prosecuted under a range of offences besides the Bribery Act, or its antecedent Acts. For example, misconduct in public office, a common law offence which carries a maximum sentence of life imprisonment, appears to be preferred by prosecutors in cases where a public official is involved. In recent years the charge has undergone something of a modern revival, and is presently used far more often than the Bribery Act—in 2017/18 alone there were 106 misconduct in public office prosecutions, up from just two in 2005.[62] This is despite CPS guidance which advises that "where there is clear evidence of one or more statutory offences, they should usually form the basis of the case, with the 'public office' element being put forward as an aggravating factor for sentencing purposes".[63]

56. Other potential charges include fraud by abuse of position under the Fraud Act 2006, the use of money laundering provisions under the Proceeds of Crime Act 2002, and more specialist legislation such as the Offender Management Act 2007, for use in relation to prisons.[64] Furthermore, the Financial Conduct Authority (FCA) has the capacity to impose fines on regulated companies for lax procedures in relation to bribery and corruption,

59 Supplementary written evidence from National Crime Agency (BRI0052)
60 Q 108 (Commander Karen Baxter)
61 HM Government, *United Kingdom Anti-Corruption Strategy 2017–2022, Year 1 Update* (December 2018), p 44: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/769403/6.5128_Anti-Corruption_Strategy_Year1_Update_v7_web.pdf [accessed 9 January 2019]
62 Q 106 (Commander Karen Baxter); Law Commission, *Misconduct in Public Office Issues Paper 1: The Current Law* (January 2016): http://www.lawcom.gov.uk/app/uploads/2016/01/misconduct_in_public_office_issues-1.pdf [accessed 4 March 2019]
63 Crown Prosecution Service, Legal Guidance, *Misconduct in Public Office* (July 2018): https://www.cps.gov.uk/legal-guidance/misconduct-public-office [accessed 4 March 2019]
64 Written evidence from Dr Nicholas Lord (BRI0019) and Her Majesty's Prison and Probation Service (BRI0050)

under section 206(1) of the Financial Services and Markets Act 2000.[65] It has done so on several occasions in the last eight years, although as Mark Steward, Executive Director of Enforcement and Market Oversight at the FCA, was keen to emphasise to us, these measures are primarily aimed at prevention, while they have standing arrangements with the NCA, City of London Police, HMRC and the SFO to ensure they identify relevant cases.[66]

57. We did not receive enough evidence one way or the other to say whether it would have been preferable to substitute charges for offences under the Bribery Act for any of these charges. However, the evidence we have received suggests the choice may come down to convenience or habit over reasoned consideration. Commander Baxter said that "a bit like muscle memory, people tend to go back to misconduct in public office rules as opposed to using what is perceived as the newer legislation", and that with time and further training, greater use of the Bribery Act would be seen.[67]

58. Her Majesty's Prison and Probation Service (HMPPS) reported that it had never seen an instance of the Bribery Act used to prosecute prison officers. While noting that the CPS, rather than the HMPPS, decides on the charges to be brought, they suggest that it is generally easier to prove offences under the Offender Management Act or misconduct in public office, which is why they are used instead:

> "If a member of staff is paid by a prisoner to perform an official function or activity improperly (e.g. not to conduct searches of prisoners, prison cells, visitors etc. at all or to the required standard), this is arguably a bribe. However, our understanding is that it is much more difficult to prove this as an offence under the Bribery Act 2010. The common law offence of Misconduct in Public Office can more easily be proven and does not need to show that a member of staff was offered or accepted a bribe." [68]

59. Nevertheless, the Law Commission, which has been examining misconduct in public office for several years now, has observed that it has been subject to extensive criticism by the Government, the Court of Appeal, the press and legal academics, and their recent consultation found that a majority of respondents believed it was in need of reform.[69] While their final report is still pending, they have made clear that "it would be undesirable either to retain the existing offence or to attempt to codify it in statute", and they expect to recommend abolishing the offence and replacing it with more precisely defined statutes.

60. **The appropriate use of misconduct in public office charges is a separate issue being considered by the Law Commission, and we make no recommendation on this. However we believe that conduct which constitutes an offence under the Bribery Act should not be prosecuted as the common law offence of misconduct in public office.**

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65 Written evidence from Dr Nicholas Ryder (BRI0010)
66 Q 113 (Mark Steward)
67 Q 106 (Commander Karen Baxter)
68 Written evidence from Her Majesty's Prison and Probation Service (BRI0050)
69 Law Commission, *Reforming Misconduct in Public Office: A Consultation Paper* (September 2016): https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/09/cp229_misconduct_in_public_office.pdf [accessed 21 January 2019]

Minor offences

61. The relative sparsity of cases appears to have much to do with the kinds of cases which are investigated and brought to trial. As can be seen in Box 1, most of the earliest cases brought under the Bribery Act were of a relatively minor nature, involving bribes of less than £10,000, and in many cases less than £1,000. However, since then these appear to have been displaced by larger corporate cases, usually involving far greater sums of money.

Box 1: Early prosecutions under the Bribery Act 2010

The first conviction under the Bribery Act 2010 came shortly after the Act came into force, when a court clerk at Redbridge Magistrates' Court was sentenced to three years for bribery and six years for misconduct in a public office, to be served concurrently, after he pleaded guilty to accepting a £500 bribe in exchange for nullifying a speeding ticket. His sentence was reduced on appeal to four years.[70]

In the second case prosecuted under the Act, an individual attempted to persuade a local council official to alter the result of a test to obtain a taxi driving licence, with offers of £200 and £300. He received a two-month prison sentence, suspended for 12 months, and a two-month curfew order.[71]

In 2013 a postgraduate student at a UK university who failed to pass his dissertation was prosecuted for offering his professor a £5,000 bribe, which was refused. After pleading guilty to bribery and possessing an imitation firearm,[72] he was sentenced to 12 months' imprisonment and ordered to pay £4,800 in prosecution costs.[73]

Section 13 defence

62. In their written evidence, Transparency International UK highlighted section 13 of the Bribery Act 2010, subsection (1) of which states:

> "It is a defence for a person charged with a relevant bribery offence[74] to prove that the person's conduct was necessary for—
>
> (i) the proper exercise of any function of an intelligence service, or
>
> (ii) the proper exercise of any function of the armed forces when engaged on active service."

63. The section 13 defence does not apply to the section 6 offence of bribery of a foreign public official for a business purpose,[75] or to an offence under section 1 which would also be an offence under section 6. The defence is therefore of limited applicability, but it would for example apply if a bribe was offered to a foreign official to reveal security information.

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70 'Freedom of Information request shows more Bribery Act 2010 prosecutions', Jonathan Armstrong, Cordery Compliance Ltd (14 May 2015): https://bis.lexisnexis.co.uk/blog/posts/anti-bribery-and-corruption/freedom-of-information-bribery-act-2010-prosecutions [accessed 4 March 2019]

71 *Ibid.*

72 As the individual put the money away, a loaded air pistol fell out of his pocket.

73 'Freedom of Information request shows more Bribery Act 2010 prosecutions',Jonathan Armstrong, Cordery Compliance Ltd (14 May 2015): https://bis.lexisnexis.co.uk/blog/posts/anti-bribery-and-corruption/freedom-of-information-bribery-act-2010-prosecutions [accessed 4 March 2019]

74 That is, an offence under section 1 which is not also an offence under section 6; an offence under section 2; and inchoate offences relating to those: see section 13(6) of the Act.

75 We consider the section 6 offence in Chapter 5.

64. Transparency International UK argued that "section 13 is not required, and its current drafting is too broad and open to abuse", as other mechanisms exist to protect military and intelligence personnel in exceptional circumstances where bribes may be necessary to their work. They also argued that due to the "large number of secondments that occur between the UK defence and arms export departments and defence companies exporting to high corruption risk countries", this defence could be used to protect corrupt defence company personnel.[76]

65. When asked whether there was evidence that section 13 had ever been used as part of a legal defence, Susan Hawley, speaking on behalf of Corruption Watch, said there was not.[77] However, she maintained that it was possible this had not entered the public domain. Ben Wallace MP, Minister of State for Security and Economic Crime at the Home Office, seemed to confirm that this was indeed the case, stating:

> "It will have been used … We do not comment publicly on how many times and how it is used, or on what issues. That is obviously in the nature of our intelligence services. The Intelligence and Security Committee has the ability to scrutinise and ask the intelligence agencies about how many occasions they have used it and why. I think it was in the law for a good reason: to make sure that our Crown servants, in carrying out their most important duty of protecting this country, have the facility to do what they need to do to keep us safe."[78]

66. In supplementary evidence to the Committee, the Government stated that the section 13 defence has "not been used in any cases conducted by or on behalf of the MOD. Likewise, the SFO has not seen the use of Section 13 in any of its cases to date." They further said:

> "The defence is tightly constrained in that it is only available to members of the intelligence services; members of the armed forces engaged on active service; or civilians subject to service discipline when working in support of members of the armed forces engaged on active service. In other words, the defence is not available to the defence industry so it is difficult to see how it could discourage prosecutions relating to that industry."[79]

67. **We invite the Intelligence and Security Committee to take evidence on the extent to which the section 13 defence is being used, and whether its use can in each case be justified; and, if they think fit, to make recommendations for the amendment or repeal of the provision.**

Enforcement agencies

68. The agencies concerned with investigating acts of bribery include local police forces, the City of London Police where more complex financial activities are involved, and the National Crime Agency when a case is national in scope or connected to organised crime. The CPS is primarily responsible for prosecuting these cases, while the Serious Fraud Office, following the Roskill model, integrates both the investigation and prosecution of the largest and most complex cases. Many of our witnesses felt that even if enforcement

76 Written evidence from Transparency International UK (BRI0003)
77 Q 39 (Susan Hawley)
78 Q 197 (Ben Wallace MP)
79 Supplementary written evidence from Government Ministers (BRI0059)

agencies were prosecuting bribery offences sparingly, they were relatively effective when such cases did emerge.[80] However, delays, and the potential under-resourcing of the relevant agencies, were raised as persistent issues.

Delays

69. Particular criticism was reserved for the SFO's handling of cases, with many witnesses criticising the time it takes for charges to be brought and cases to reach trial. The law firm Baker McKenzie stated that, based on their experiences and on information in the public domain, SFO bribery investigations take an average of four and half years, while Clifford Chance noted that they could take five or six years to conclude.[81] Sean Curran, a solicitor with experience in this area, highlighted the lack of updates which clients often faced when dealing with the SFO, while property seized from companies could often take "well over a year" to be returned.[82] Neil Swift, a partner at Peters and Peters, said he had clients "who are interviewed and then will not hear anything from the SFO for 12, 15 or 18 months," while Amanda Pinto QC, then Vice-Chair Elect of the Bar Council and now Vice-Chair, concurred, with some of her clients "left adrift literally for years".[83]

70. Criticisms about the lengthy nature of investigations were not limited to the SFO though, and several witnesses told us of equivalent delays in investigations and prosecutions conducted by the police and the CPS.[84] For example, Ian Pigden-Bennet, the former CEO of Skansen, explained to us that despite taking the decision to self-report the company to the City of London Police in March 2014, 21 months elapsed before the company was informed that it might have contravened section 7 of the Bribery Act.[85] It took a further 14 months before a company shareholder and a non-executive director were cautioned and interviewed, and only in March 2017—around three years after the initial self-report—was the company formally charged under section 7.

71. As Clifford Chance emphasised in their written evidence, these delays could impose a significant "financial and operational burden" on companies, as well as a personal impact on individuals being investigated.[86] Several witnesses argued that the excessive duration of these investigations pointed towards fundamental issues within the SFO, such as a lack of effective systems for keeping investigations on track, or a lack of resources.

72. When we raised these criticisms with the relevant agencies, they denied that the slow pace of investigations was in any way indicative of internal issues, and instead told us that they resulted from the often large and complex nature of bribery cases. In particular, the extraordinary quantities of evidence which often have to be examined and disclosed were highlighted—the Metropolitan Police Service told us that "due to the lack of technical solutions, documents require manual analysis and with hundreds of thousands of documents in

80 Written evidence from Stewarts Law (BRI0043), Monty Raphael QC (BRI0016), Peters and Peters Solicitors LLP (BRI0028), Greenberg Traurig (BRI0026)
81 Written evidence from Baker McKenzie LLP (BRI0030) and Clifford Chance LLP (BRI0036)
82 Written evidence from Mr Sean Curran (BRI0048)
83 Q 164 (Neil Swift and Amanda Pinto QC)
84 Written evidence from the Metropolitan Police Service (BRI0035), Stewarts Law (BRI0043), Corruption Watch (BRI0039), Law Society of England and Wales, the City of London Law Society and the Fraud Lawyers Association (BRI0025)
85 Written evidence from Ian Pigden-Bennett (BRI0053) See further Chapter 6, paras 218–26.
86 Written evidence from Clifford Chance LLP (BRI0036)

each case this review can take over 18 months to complete."[87] Lisa Osofsky, Director of the SFO, highlighted the Rolls-Royce case, in which 30 million documents had to be analysed,[88] and in a more recent speech mentioned a case in the pipeline involving more than 100 million documents.[89] The SFO have, however, begun to experiment with the use of artificial intelligence for document sifting, with a pilot system used during the Rolls-Royce case, which was able to scan documents for legal professional privilege content 20,000 times faster than a human lawyer and led to savings of 80% in the area in which it was used.[90] The SFO is now deploying this and other AI-powered systems across its new casework. The use of this complex and sometimes opaque technology will require careful and considered oversight to ensure that new issues, such as unforeseen biases in algorithms, do not inadvertently cause problems for investigations. Nevertheless, we find developments in this field encouraging, and believe this technology will provide substantial assistance in speeding up complex bribery cases in the future.

73. Cases can be further delayed by a variety of other factors. Those with an international element may involve lengthy communications with foreign agencies.[91] Once an investigation has been completed, it can often be difficult to secure scarce court time in order to actually try a case—Corruption Watch observed that the SFO often has to wait over a year just to get a court slot for one of its cases to be heard.[92]

74. However, there were internal issues within the SFO and the CPS which were brought to our attention. We received evidence regarding the impact of relatively low salaries for lawyers and investigators at the SFO and the CPS, by comparison with their private sector counterparts. Peters and Peters noted that the SFO were often losing staff to city law firms, while Louise Hodges, a partner at Kingsley Napley, told us that "there is an issue about whether you can pay for the quality of people that you may want to investigate and deal with [bribery] cases".[93] When we asked the SFO about the potential impact of staff turnover on casework, Ms Osofsky noted that while "there will be a number of staff changes during the life of a typical SFO investigation", this is not unique to the SFO, and she did not accept that casework "has ever been significantly reduced or adversely affected by turnover of staff".[94] Turnover since 2012 has remained consistent at around 14% of permanent staff, and they expect this to remain the case for 2018/19. Despite this assurance, we believe turnover must be a significant factor behind the slow pace of SFO investigations, which should be investigated further.

75. Max Hill QC, Director of Public Prosecutions (DPP), downplayed the issue when asked whether the requirement to seek the personal consent of the

87 Written evidence from Metropolitan Police Service (BRI0035)
88 Q 157 (Lisa Osofsky). The figure given by Hannah von Dadelszen, the Head of Fraud at the SFO, was 40 million, see Q 117..
89 Serious Fraud Office, Speeches, 'Ensuring our country is a high risk place for the world's most sophisticated criminals to operate' (3 September 2018): https://www.sfo.gov.uk/2018/09/03/lisa-osofsky-making-the-uk-a-high-risk-country-for-fraud-bribery-and-corruption/ [accessed 4 March 2019]
90 Serious Fraud Office, News Releases, 'AI powered 'Robo-Lawyer' helps step up the SFO's fight against economic crime' (10 April 2018): https://www.sfo.gov.uk/2018/04/10/ai-powered-robo-lawyer-helps-step-up-the-sfos-fight-against-economic-crime/ [accessed 12 February 2019]
91 Written evidence from Metropolitan Police Service (BRI0035)
92 Written evidence from Corruption Watch (BRI0039)
93 Peters & Peters Solicitors LLP (BRI0028), Q 138 (Louise Hodges)
94 Supplementary written evidence from the Serious Fraud Office (BRI0051)

DPP for every bribery prosecution (dealt with later in this chapter) might be a factor behind the delays:

> "… we reserve to ourselves the right, in general crime and in specialised areas such as this, to say to the investigator, whoever that might be, that a little more work needs to be done before we reach the charging point. That is not delay. It is certainly not a bottleneck. It is the prosecuting authority taking care to ensure that in each case where personal consent is granted, as here, the case is really ready to run."[95]

76. The slow pace of investigations, and in particular the failure to update companies on their progress, is a matter of concern to us. Investigations of this nature can place a significant burden on companies in terms of the co-operation required of them by the authorities, the amount of scarce senior management time consumed in handling the issue, and the anxiety and loss of reputation they suffer in the meantime. This is especially the case for SMEs, which may lack the resources to cope. We appreciate that there will always be some cases which are more complex or involve international elements which will slow down investigations, but the evidence we have received suggests that there are excessive delays even in the majority of more straightforward domestic bribery investigations.

77. It is therefore of the utmost importance that the SFO, the police and the CPS do everything in their power to ensure that bribery cases progress as quickly as possible, and we are not convinced that this is currently occurring. The relevant agencies should consider the pace at which their investigations are conducted, and the frequency with which updates are provided to the concerned parties, and consider all appropriate means for speeding this process up. Improving the management of cases should be a priority.

78. **We recommend that the Director of the Serious Fraud Office and the Director of Public Prosecutions publish plans outlining how they will speed up bribery investigations and improve the level of communication with those placed under investigation for bribery.**

Financial resources

79. As can be seen in Figure 1, overall funding for the SFO has increased since the Bribery Act came into force, and last year there was a significant shift in the way this funding is allocated. Historically, the SFO received a set amount of 'core' funding every year, and was then required to apply to the Treasury to secure additional 'blockbuster' funding for expensive cases. This used to apply in any case which was forecast to cost more than 5% of the core budget, as, for example, with the Rolls-Royce investigation. This system drew criticism, including from the OECD, on the basis that a conflict of interest could arise if the Government did not want a prosecution to be pursued, although to date the Treasury has never refused this form of funding.[96] A 2016 report by the CPS Inspectorate recommended that the SFO could provide better value for money if its core funding was increased and it was made less reliant on blockbuster funding.[97]

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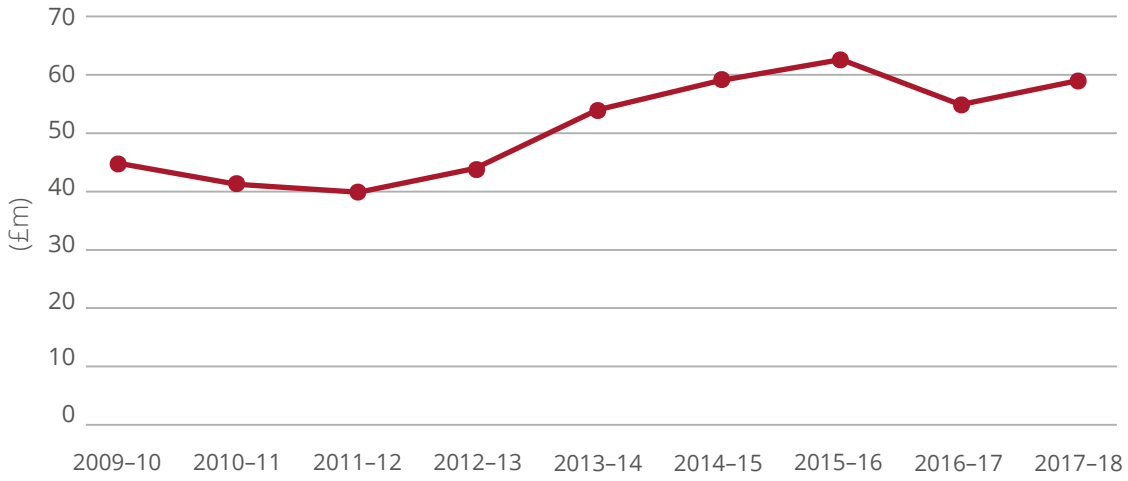
95 Q 156 (Max Hill QC)
96 Q 19 (Michelle Crotty)
97 HM Crown Prosecution Inspectorate, *Inspection of the Serious Fraud Office governance arrangements* (May 2016), p 2: https://www.justiceinspectorates.gov.uk/hmcpsi/wp-content/uploads/sites/3/2016/05/SFO_May16_rpt.pdf [accessed 3 January 2019]

Figure 1: SFO Funding 2010–2018



Source: SFO, 'Changes to SFO funding arrangements' (19 April 2018): https://www.sfo.gov.uk/2018/04/19/changes-to-sfo-funding-arrangements/ [accessed 4 March 2018]

80. In response to these criticisms, and a request from Jeremy Wright QC MP, the then Attorney General, to look into the matter, the Government announced in April 2018 that the SFO's core budget would be increased from £34.3 million, as originally earmarked for this year, to £52.7 million.[98] Under the new arrangements, the SFO can still call on the Treasury for blockbuster funds to cover costs above £2.5m on a single case in a given year, but it is expected that there will be less need for this with an increased core budget, and the SFO accordingly expects these changes to be fiscally neutral in practice.[99]

81. Contrary to the claims of some of our witnesses,[100] Ms Osofsky made clear to us that she did not consider funding to be an issue at present:

> "We have not faced the sad day when we cannot bring a case because we do not have the money. I would not want that to happen in my lifetime. Given the [new] funding structure, I am confident that I will not face that. At this point, my sense is that we have the finance that we need—for now, provisionally."[101]

Training

82. We received evidence from the City of London Police which suggests that comprehensive training on the Bribery Act may be lacking in many police forces. In their written evidence to us they explained that:

> "Following the implementation of the Bribery Act very few police forces were given training and advice so knowledge of legislation was low. This resulted in a slow start for prosecutions and continued use of Fraud

98 Caroline Binham, 'SFO core budget boosted by 50% after funding criticism', *Financial Times* (19 April 2018): https://www.ft.com/content/a5830aa8-43ec-11e8-803a-295c97e6fd0b [accessed 4 March 2019]

99 Serious Fraud Office, Statements, 'Changes to SFO funding arrangements' (19 April 2018): www.sfo.gov.uk/2018/04/19/changes-to-sfo-funding-arrangements/ [accessed 4 March 2019]

100 Written evidence from Law Society of England and Wales, the City of London Law Society and the Fraud Lawyers Association (BRI0025), Baker McKenzie (BRI0030), Fraud Advisory Panel (BRI0020), Monty Raphael QC (BRI0016)

101 Q 157 (Lisa Osofsky)

by Abuse of Position, where a bribery charge might have been more appropriate."[102]

83. Anti-bribery training is provided to police officers as part of professional standards training provided by the College of Policing—however, this appears to be focused primarily on preventing internal police corruption, rather than in the use of the Act for investigations. The City of London Police have developed a five-day training course in bribery and corruption investigations, but this is not a standard course, and is therefore "subject to policing priorities and budgets of individual forces".[103] The City of London Police said that since 2013 they have trained over 130 delegates across 12 of the 43 police forces in England and Wales. The NCA also cited the City of London Police's assistance in training officers in the International Corruption Unit.[104]

84. As noted earlier in this chapter, a lack of familiarity with the Act may in turn contribute to a tendency to use alternative charges, like misconduct in public office or fraud, instead of sections 1 and 2 of the Bribery Act. In many cases these alternative charges may be more appropriate. But every force in the country should have officers available who fully understand the Bribery Act.

85. **A lack of awareness of and training on the Bribery Act may be a contributing factor in the lack of bribery prosecutions. The Government should provide the resources for the City of London Police's Economic Crime Academy to expand its anti-bribery training programme, and should ensure that every police force has at least one senior specialist officer who has undertaken the training.**

Interagency co-operation

86. Following the agreement of the OECD's Anti-Bribery Convention in 1997, a four-phased international inspection process was introduced, overseen by a Working Group on Bribery (WGB). In its Phase 3 Report for the UK, the WGB expressed concerns about co-operation between enforcement agencies with regard to corruption.[105] In particular, it highlighted issues surrounding the assignment of cases between the Financial Services Authority (FSA) (which until 2013 regulated financial conduct, before being replaced by the Financial Conduct Authority (FCA)) and the SFO, and the SFO's reluctance to pursue parallel criminal proceedings where the FSA had already brought a civil action. They concluded that "the SFO and FSA should conduct coordinated enforcement actions where appropriate [as the] FSA's fines … may not fully reflect the gravity of the criminality in a case".

87. Their subsequent Phase 4 Report, published in 2017, suggests that this situation has not sufficiently improved, noting a "limited level of mobilisation in the FCA in relation to foreign bribery-related offences".[106] However, the report does note that several agencies, including the FCA, the NCA, the

102 Written evidence from City of London Police (BRI0022)
103 *Ibid.*
104 Q 189 (James Mitra)
105 OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (March 2012), pp 29–30: https://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf [accessed 9 January 2019]
106 OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: United Kingdom* (2017), p 30: http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf [accessed 9 January 2019]

City of London Police and the SFO, had updated their Memorandum of Understanding (MoU) with regard to corruption investigations, and that a further MoU was being prepared at that time. This would include HMRC and the UK Financial Intelligence Unit (which is now part of the NCA). When we heard from France Chain, Senior Legal Analyst at the Anti-Corruption Division of the OECD, she re-iterated the OECD's assessment as of 2017, but could not comment on any further progress the UK may have made since then.[107] At the time of writing, a further update from the OECD on this is due this month.

88. When we put the OECD's assessment to Mark Steward, Executive Director of Enforcement and Market Oversight at the FCA, he made clear he did not accept that it was accurate, and said that the FCA would be writing to the OECD for clarification on this.[108] Hannah von Dadelszen, Head of Fraud at the SFO, concurred on this point.[109] Edward Argar MP, Parliamentary Under Secretary of State at the Ministry of Justice, also rejected the OECD's assessment on this point, and stated that he believed "there are effective intelligence-sharing mechanisms in place between the enforcement agencies, including the SFO and the FCA."[110]

89. The National Economic Crime Centre (NECC) was cited by several witnesses as one of the principal ways in which the Government and law enforcement agencies are aiming to improve co-operation with regard to economic crime, including bribery.[111] This was announced alongside the Government's Anti-Corruption Strategy in December 2017, with the aim of coordinating the national response to economic crime, and "will draw on expertise from across government, law enforcement and criminal justice agencies, as well as new resources provided by the private sector".[112] It formally began operations on 31 October 2018, with approximately 55 staff members and a budget of around £6 million. While being based within the NCA, it also draws on resources from HMRC, the City of London Police, the Home Office, the FCA and other relevant agencies.

90. However Ben Wallace MP also accepted "there is not enough intelligence on bribery" and "our knowledge of that landscape is not good enough", which is why the Government is also establishing a National Assessment Centre (NAC) for economic crime, including bribery, to facilitate improved intelligence sharing.[113] Ministers stated that this will provide all the co-operation that is needed.

91. The Phase 4 Report also identified problems in the working relationship between law enforcement authorities in England and Wales, and in Scotland:

> "Scottish law enforcement officials appeared to have limited involvement and expertise on foreign bribery issues. They were not aware of the MOU

107 Q 100 (France Chain)
108 Q 116 (Mark Steward)
109 Q 116 (Hannah von Dadelszen)
110 Q 198 (Edward Argar MP)
111 Q 195 (Ben Wallace MP), Q 187 (Donald Toon), Q 108 (Commander Karen Baxter), written evidence from SFO (BRI0018)
112 Home Office, 'Home Secretary announces new national economic crime centre to tackle high level fraud and money laundering' (11 December 2017): https://www.gov.uk/government/news/home-secretary-announces-new-national-economic-crime-centre-to-tackle-high-level-fraud-and-money-laundering [accessed 15 January 2019]
113 Q 195 (Ben Wallace MP)

> which regulates foreign bribery case attributions [i.e. the Memorandum of Understanding to which COPFS, CPS, FCA, SFO and others are party], even though COPFS is a party to it, or of the regular meetings to discuss cases … This lack of awareness of Scottish law enforcement authorities and their absence in the Clearing House discussions is regrettable, particularly given that Scotland has a growing economic presence and Scottish industries operate internationally in industrial sectors sensitive to corruption, such as mining, and oil and gas."[114]

92. When we asked Gillian Mawdsley, Secretary of the Criminal Law Committee of the Law Society of Scotland, for her views on this, she acknowledged that "communication is something we could all look at, on both sides of the border".[115] She suggested that the MoU which covers cross-border jurisdiction in terrorism cases might be a model for improvement, as it is "a public document and is clear for everybody".[116] James Wolffe QC, the Lord Advocate, told us he could not comment on the accuracy of claims by the OECD that Scottish prosecutors had not been in attendance at meetings of the UK Bribery, Corruption and Sanctions Evasion Threat Group and the Foreign Bribery Intelligence Clearing House at the time of their review, but stated that senior Scottish prosecutors do now attend those meetings.[117] He told us he was "as confident as I can be that we have good channels of communication with our colleagues and counterparts in other parts of the UK".

93. **The OECD has criticised a lack of co-operation and co-ordination between the many different bodies involved in the investigation and prosecution of bribery. We wait to see whether the National Economic Crime Centre will provide the necessary central focus. The Scottish prosecution authorities should have a permanent presence.**

Consent to prosecution

94. Section 10 of the Bribery Act provides that no proceedings for an offence under the Act may be instituted in England and Wales except by or with the consent of the DPP, the Director of the Serious Fraud Office, or the Director of Revenue and Customs Prosecutions. There is an equivalent provision for Northern Ireland. There are further detailed provisions requiring such decisions to be taken by the Directors in person, and specifying the very limited circumstances in which a decision can be taken on their behalf by a person authorised by them.

95. This differs from the norm in England and Wales, where the general provision for prosecutions is section 1(7) of the Prosecution of Offences Act 1985 which allows any Crown Prosecutor (not just a Chief Crown Prosecutor) to give consent on behalf of the DPP, though they must exercise their powers under the direction of the DPP.[118]

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114 OECD, *Implementing the OECD Anti-Bribery Convention, Phase 4 Report: United Kingdom* (2017) p 31: http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf [accessed 9 January 2019]

115 Q 87 (Gillian Mawdsley)

116 Q 89 (Gillian Mawdsley)

117 Q 146 (James Wolffe QC)

118 There are other statutes where consent is required for the commencement of prosecutions (not always from the DPP), including the Borders, Citizenship and Immigration Act 2009, section 18; the Investigatory Powers Act 2016, sections 3, 155, 173, 196 and 224; and the Data Protection Act 2018, section 197.

96. Before the Bribery Act, all previous bribery legislation required that the consent of the Attorney General should be obtained before a prosecution could proceed.[119] The decision to lower this level of consent to the level of the respective prosecutorial directors was not without controversy—the Joint Committee on the Draft Bribery Bill discussed this proposal at length, noting the need to strike a balance between prosecutorial independence on the one hand, and parliamentary accountability on the other.[120] They also noted the broader context of the time, in which the powers of the Attorney General more generally were being reconsidered by the Government, and the Joint Committee on the Draft Constitutional Renewal Bill had earlier rejected the Government's proposal to remove the Attorney General's power to direct prosecutions.[121]

97. Ten years after the requirement for prosecutorial consent was changed from the Attorney General to Director level, some witnesses told us that the level was still too high, and should be brought into line with general provisions for prosecution. Mike Betts of the City of London Police told us that in practice, "the Bribery Act is perceived to be for use only at the highest echelons, because of the consent that is required", and this was similarly the case with previous legislation.[122]

98. When we asked Mr Argar what the Government's view on this was, he rejected any suggestion that the high level of authorisation required was limiting prosecutions, and said that "the bar is probably correctly set and operating in a way that allows it to be used efficiently".[123] Ben Wallace MP also emphasised that there were questions of national security and the public interest in at least some bribery cases, and the DPP "is therefore perfectly positioned" to be able to make those decisions.[124]

99. Ms Osofsky explained that, due to the serious and high level nature of the SFO's cases, all of them require her personal consent in order to proceed to prosecution, but this is an administrative matter, which does not require any statutory provisions.[125] When we asked Mr Hill about the consent question, while acknowledging that it did require him to personally sign off every bribery prosecution, regardless of the seriousness of the case, he denied that it created any bottleneck in the process, partly because the number of prosecutions was so low.[126] However, when questioned further, he was open to the idea of a "more flexible regime" which did not require his personal consent, and suggested that in low-level cases, the authorisation of a regional Chief Crown Prosecutor might be appropriate.

100. We believe the statutory requirement is inflexible and unnecessary. There will of course be situations (for example, section 6 offences, or those involving foreign powers) where the DPP may wish to reserve to himself particular categories of offence, and this is entirely appropriate. This can however be done without a statutory provision.

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119 Q 192 (Edward Argar MP)
120 Joint Committee on the Draft Bribery Bill, *Draft Bribery Bill* (First Report, Session 2008–09, HC 430, HL Paper 430), pp 58–60
121 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill* (Report of Session 2007–08, HC 551, HL Paper 166), pp 34–37
122 Q 106 (Mike Betts)
123 Q 192 (Edward Argar MP)
124 Q 193 (Ben Wallace MP)
125 Q 156 (Lisa Osofsky)
126 Q 156 (Max Hill QC)

101. **The current requirement for prosecutions to be initiated only with the written consent of one of the Directors is too rigid. Subsections (3) to (7) of section 10 of the Act should be repealed and replaced by a provision allowing the Directors to delegate the power to initiate proceedings to officials, as they see fit. Subsections (8) to (10) should be repealed and equivalent provisions substituted for Northern Ireland.**

102. There are no provisions in the Act for consent to prosecution in Scotland. We deal with the position there in Chapter 9.[127]

Vicarious liability

103. A number of witnesses called for the replacement of the identification principle in English law with a vicarious liability regime, as is the case in the United States.[128] The identification principle is a central feature of English corporate law, which requires that any successful prosecution of a business needs to demonstrate that the controlling minds of the business (usually the board of directors) were aware of the criminal actions, and possessed the necessary *mens rea*. A number of witnesses argued that this model is inherently disadvantageous to SMEs, compared with large companies (especially transnational corporations), as it is much easier to identify the controlling minds of a small company and hold them responsible.[129]

104. Transparency International UK advocated the US approach to corporate liability, in which a corporation is liable for the acts or omissions of an employee which take place in the course of that employee's employment (vicarious liability)."[130] In their view, "this new statutory form of vicarious liability should retain the 'adequate procedures' defence in order to incentivise prevention of bribery as part of corporate good governance."

105. The SFO told us that reliance on the identification principle:

> "leads to the inequitable position that it is far easier to fix small, owner-managed companies with the requisite knowledge and intent than large, multi-national corporations. The practical reality is that in a multi-national company, the few people who could embody the 'directing will and mind' of the company will not necessarily involve themselves in the company's operations in the same way as a director of a smaller, family-run enterprise. Therefore and perversely, larger companies, which have the potential to cause greater harm, are less likely to be found criminally liable for their wrongful acts."[131]

106. Successive directors of the SFO have long argued in favour of adopting vicarious liability, and Ms Osofsky made clear to us that she shares this view. She said that, if a vicarious liability regime were to be introduced,

> "we might find ourselves less hamstrung by the identification principles. We might make better progress against some of the larger, fair-fight opponents of the SFO. I am willing to take them on. I wish the law was

127 Paras 354–59
128 Written evidence from Serious Fraud Office (BRI0018), Transparency International UK (BRI0003), Corruption Watch (BRI0039), Lord Garnier QC (BRI0038)
129 Written evidence from Serious Fraud Office (BRI0018), Corruption Watch (BRI0039), Q 136 (Rodney Warren and Louise Hodges)
130 Written evidence from Transparency International UK (BRI0003)
131 Written evidence from the Serious Fraud Office (BRI0018)

completely in my court, because I would like to be able to show just how much that is a challenge I welcome. But for now it is harder."[132]

107. However, a number of our witnesses were vigorously opposed to any move to introduce vicarious liability into English corporate criminal law. Eoin O'Shea, a Partner at Reed Smith and Chair of the Corporate Crime and Corruption Committee of the City of London Law Society, emphasised that the identification principle was "a hugely difficult topic" that has been the subject of considerable debate over the years. He argued that in his experience, the idea that "big companies are aware of the nature of the identification principle and so organise their affairs in such a way as to insulate senior management from any identified decision-making, and therefore the company from criminal liability" was not a widespread reality.[133] Amanda Pinto QC told us she personally would be "very unhappy" if the law ever moved towards vicarious liability in corporate cases, and questioned what the purpose of such a move would be—"if it is to get money back by confiscation and compensation" alone, then "that does not seem the right reason for criminalising" corporations vicariously.[134] Neil Swift, a partner at Peter and Peters, concurred, explaining that one of the main problems with vicarious liability as a model is "that it puts too much of a focus on the exercise of prosecutorial discretion, so it would be up to the SFO whom it decides to prosecute".[135]

108. Ultimately a majority of witnesses believed that section 7, which allows companies to be prosecuted if they fail to prevent bribery by their employees, and which we discuss in more detail in Chapter 6, was a reasonable compromise.[136] We are of the opinion that section 7 deals more than adequately with the question of corporate responsibility for offences committed by the servants or agents of companies, without the potential unintended consequences of a shift to a vicarious liability regime, which would represent a major shift in corporate law more generally.

109. **There are arguments for amending the general law to make corporations vicariously liable for offences committed by their employees and agents. However this goes beyond offences under the Bribery Act. We do not make any recommendation for a change in the law.**

The Government's Anti-Corruption Champion

110. The role of Anti-Corruption Champion has existed since 2004, is a personal appointment of the Prime Minister, and has had seven incumbents: Hilary Benn MP, John Hutton MP (now Lord Hutton of Furness),[137] Jack Straw MP, Kenneth Clarke MP, Matt Hancock MP, Eric Pickles MP (now Lord Pickles) and John Penrose MP, appointed in December 2017.

111. A 2017 Government submission described Mr Penrose's job as:

- Scrutinising and challenging the performance of departments and agencies.

132 Q 157 (Lisa Osofsky)
133 Q 136 (Eoin O'Shea)
134 Q 165 (Amanda Pinto QC)
135 Q 165 (Neil Swift)
136 See paras 170–171.
137 A member of this Committee.

- Leading the UK's push to strengthen the international response to corruption and representing the UK at relevant international fora.
- Engaging with external stakeholders, including business, civil society organisations, parliamentarians, and foreign delegations to make sure that their concerns are taken into consideration in the development of government anticorruption policy.[138]

112. The role is supported by a small team of civil servants, the Joint Anti-Corruption Unit (JACU). The Government explained that JACU was:

> "a joint integrated unit, co-ordinating anti-corruption work across government, representing the UK at international anti-corruption fora and providing support to the Anti-Corruption Champion. It is also responsible for developing strong relationships with business, civil society and foreign governments."[139]

In particular, it noted that the JACU meets with the Champion on a weekly basis to discuss the implementation of the Anti-Corruption Strategy, in particular the 134 actions which are identified as areas of concern.

113. JACU was initially located in the home department of the minister in question (respectively the Department for International Development, Business, the Ministry of Justice, and Business again), before moving to the Cabinet Office, and since December 2017 is now in the Home Office. The Government told us that the most recent shift was to "enable better co-ordination of domestic and international anti-corruption efforts and to promote stronger links between anti-corruption and other economic and organised crime".[140]

114. The role was originally attached to a Cabinet Minister, before moving to a former Cabinet Minister. At the time of his appointment, and when he gave evidence to our Committee, Mr Penrose was a backbench MP, although he has since been appointed as a Minister of State in the Northern Ireland Office. When we asked whether this growth in responsibilities for Mr Penrose might detract from his work as Anti-Corruption Champion, we were assured that he remains "fully committed to his role", and cited the capabilities of the JACU in supporting the Champion.[141] As well as providing a private office function, this support included:

> "arranging and briefing the Champion on meetings with key stakeholders both inside and outside government, developing policy initiatives in conjunction with and on the request of the Champion, providing expert policy advice, supporting the Champion at international fora and organising the Inter-Ministerial Group which the Champion co-chairs alongside the Security Minister."[142]

115. **Ensuring that the Government's Anti-Corruption Champion is a sufficiently high-level office-holder, with appropriate access to other ministers and senior officials, is crucial for ensuring that decisions**

138 UK Submission to the UN Convention against Corruption, United Nations Office on Drugs and Crime: *United Nations Convention against Corruption* 24 November 2017, pp 7–8: https://www.unodc.org/documents/treaties/UNCAC/SA-Report/2018_01_09_UK_SACL.pdf [accessed 4 March 2019]

139 Supplementary written evidence from HM Government (BRI0059)

140 *Ibid.*

141 *Ibid.*

142 *Ibid.*

relating to corruption are acted on and seen through to completion. We believe that the right individual should be a minister to have the necessary influence to act as the Government's Anti-Corruption Champion, and should be provided with the appropriate support and resources.

CHAPTER 4: CORPORATE HOSPITALITY

116. Corporate hospitality is a necessary and legitimate part of doing business, but it can also be taken advantage of by companies seeking to disguise bribery as legitimate corporate hospitality. Even seemingly unglamorous operations like potato buying are areas where hospitality can be abused for illegitimate means—in 2012 three men were jailed for involvement in a potato bribery scam, in which two directors provided gifts and hospitality to a supermarket potato buyer in return for contracts, resulting in Sainsbury's being overcharged by £9 million.[143] Therefore a balance needs to be struck between regulating corporate hospitality and allowing businesses to build relationships with clients. Above their legal obligation to obey the Bribery Act, certain ethical principles should guide companies; for example, the Committee on Standards in Public Life[144] has recently extended the Nolan principles to private sector companies which deliver public services.[145]

Box 2: Hospitality in different cultures

In certain cultures, such as in China, traditionally a different approach to hospitality has often been taken. Particularly prominent in Hong Kong corporate culture, mooncakes are a gift that is a symbol of building trust and friendship. These cakes can be expensive, with gold dusted mooncakes being a particularly lavish example.[146] Similarly, 'red envelopes', traditionally containing money, are given as gifts during the Chinese New Year.[147] When expected as a gift from UK business people, who must abide by UK bribery legislation, this can present a difficult choice between potentially damaging a business relationship and breaking UK law. In oral evidence, Lesley Batchelor, Director-General of the Institute of Export and International Trade, has stated: "as an individual I feel that this places people in a very awkward situation."[148]

The Ministry of Justice Guidance

117. The Act itself contains no specific reference to corporate hospitality, although the Ministry of Justice statutory Guidance on the Bribery Act 2010 outlines how corporate hospitality should be approached. The introduction to the Guidance, by the Rt Hon Kenneth Clarke QC MP, then Lord Chancellor and Secretary of State for Justice, states:

> " … combating the risks of bribery is largely about common sense, not burdensome procedures. The core principle [the Guidance] sets out is proportionality. It also offers case study examples that help illuminate the application of the Act. Rest assured–no one wants to stop firms

143 'Sainsbury's potato bribe scam: Three jailed', *BBC News* (22 June 2012): https://www.bbc.co.uk/news/uk-england-cambridgeshire-18547086 [accessed 7 January 2019]

144 Lord Stunell, a member of this Committee, is also a member of the Committee on Standards in Public Life.

145 The Nolan principles include selflessness, integrity, objectivity, accountability, openness, honesty, and leadership. Committee on Standards in Public Life, *The Continuing Importance of Ethical Standards for Public Service Providers* (May 2018), p 6: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705884/20180510_PSP2_Final_PDF.pdf [accessed 14 February 2019]

146 'Mooncake season strikes again in Asia', *BBC News* (8 September 2014): https://www.bbc.co.uk/news/av/business-29103438/mooncake-season-strikes-again-in-asia [accessed 10 January 2019]

147 'China media: Lunar New Year goes global', *BBC News* (23 February 2015): https://www.bbc.co.uk/news/world-asia-china-31582484 [accessed 10 January 2019]

148 Q 56 (Lesley Batchelor)

> getting to know their clients by taking them to events like Wimbledon or the Grand Prix."[149]

The Guidance is clear that the Act does not aim to stop corporate hospitality *per se*, but simply to prevent bribery under the façade of corporate hospitality.

118. Paragraph 20 of the Guidance explains this in relation to section 1 offences, stating that in order to proceed with a case based on an allegation that the "hospitality was intended as a bribe the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust", judged by what a "reasonable person" in the UK thought.[150] To illustrate this, the Guidance provides the example of an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation's field. Since there is "unlikely to be evidence of an intention to induce improper performance of a relevant function", this example is "extremely unlikely" to engage section 1.[151]

119. Paragraphs 26 to 32 give many examples of how hospitality on the international stage would or would not infringe section 6 (bribery of a foreign public official). Like the introduction, this section emphasises that the aim of the Act is not to penalise "reasonable and proportionate hospitality and promotional or other similar business expenditure" intended to "improve the image of a commercial organisation", while accepting that hospitality and promotional or other similar business expenditure can be employed as bribes. As with section 1, section 6 requires an intent to bribe, or in other words an intent to gain "a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage."[152]

120. The prosecution must then show that "there is a sufficient connection between the advantage and the intention to influence and secure business or a business advantage." The evidence for this connection would include matters such as "the type and level of advantage offered, the manner and form in which the advantage is provided, and the level of influence the particular foreign public official has over awarding the business." The lavishness or expenditure of corporate hospitality is not in itself an issue; expenditure should only become problematic when there is an evidential link to an intention to bribe. However, generally the more lavish or expensive travel expenditure or corporate hospitality is, "the greater the inference that it is intended to influence the official to grant business or a business advantage in return," although differing 'normal' expenditure between sectors may be relevant.[153]

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149 Ministry of Justice, The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (March 2011) p 2: https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf [accessed 7 January 2019]

150 Ministry of Justice, *The Bribery Act 2010 Guidance*, p 10

151 *Ibid.*

152 Ministry of Justice, *The Bribery Act 2010 Guidance*, p 12

153 Ministry of Justice, *The Bribery Act 2010 Guidance*, p 13

Uncertainty surrounding the Guidance

121. Despite the Guidance, companies are fearful of hospitality contravening section 1 or section 6, and compliance regimes are often too strict. Evidence received from companies and organisations such as the Association for Financial Markets in Europe (AFME) has shown that companies are uncertain "on the application of the Act to the acceptance of corporate hospitality." [154] Likewise, the Aerospace Defence Security and Space Group, while praising the Guidance as a whole as "relatively clear and concise", stated in written evidence that greater clarity is needed around the provision of hospitality, which they believe "is still causing some confusion in certain circles, both within the hospitality Industry as well as wider."[155]

122. In particular, there is uncertainty on two questions. First, given the "greater inference" that expensive or lavish hospitality is intended for a business advantage, can it ever risk contravening sections 1 or 6? Secondly, what constitutes 'normal' expenditure within a given sector? As suggested in the OECD Phase 3 and Phase 4 Reports,[156] the meaning of "reasonable and proportionate hospitality" in paragraph 26 and the "standards of norms applying in a particular sector" in paragraph 29 of the Guidance are unclear.[157]

123. In written evidence Pinsent Masons LLP drew attention to the vagueness of some of the Guidance, especially around gifts and hospitality in the Introduction to the Guidance and in paragraphs 26 to 30. Pinsent Masons claimed this could lead to companies "adopting an overly cautious approach to gifts and hospitality in low risk settings which the Guidance notes was not the intention of the Government." However, they also noted that "There is a bizarre and potentially dangerous example of acceptable hospitality given at paragraph 31 of a UK company paying for a public official and the official's spouse to meet in New York and attendance at a baseball match and fine dining." Despite being given in the Guidance, many anti-corruption practitioners would disagree with it "being acceptable for a UK company to pay for a foreign public official, let alone the official's wife, to meet in New York."[158] In written evidence Fieldfisher LLP noted that clear guidance is especially important without a body of case law.[159]

High Risk Sectors

124. Certain sectors seem to be particularly affected by unclear guidance. For example, as argued in oral evidence by Chris Blythe, CEO of the Chartered Institute of Building (CIOB), the construction sector is fragmented and has long supply-chains, making enforcement of hospitality policy difficult.[160] Research by the CIOB from 2013 looked at the use of corporate hospitality within the sector. The CIOB noted that there was considerable confusion within the industry regarding how hospitality was considered in the Bribery Act, and it was seen as a grey area in general, with respondents indicating that the issue of hospitality was subjective. The report stated that:

154 Written evidence from the Association for Financial Markets in Europe (BRI0012)
155 Written evidence from the Aerospace Defence Security and Space Group (BRI0037)
156 Organisation for Economic Co-operation and Development Working Group on Bribery, Phase 4 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom (March 2017), p 98: http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf [accessed 8 January 2019]
157 Ministry of Justice, *The Bribery Act 2010 Guidance*, pp 12-13
158 Written evidence from Pinsent Masons LLP (BRI0041)
159 Written evidence from Fieldfisher LLP (BRI0005)
160 Q 73 (Chris Blythe)

> "A number of respondents feel that gifts and corporate hospitality have led to the blurring of boundaries. They believe these issues create confusion and an environment for shady business practices that should be avoided at all costs. Some respondents even suggest that practices often seen as common courtesy, such as refreshments at meetings or business lunches, can be interpreted as a possible bribe or a way to influence a decision."[161]

125. Event and sports organisation is another sector adversely effected. The Major Event Organisers Association (MEOA), while praising the Guidance, raised concerns about the lack of "common sense" used when attempting to tackle bribery masquerading as legitimate corporate hospitality:

> "There were concerns within the events industry at the time of the introduction of the 2010 Bribery Act, although the particularly helpful foreword to the Guidance for the Act from the then Secretary of State for Justice, Kenneth Clarke MP, was very useful clarification for all parties on how the Bribery Act was to be interpreted in relation to events and hospitality … However, in recent years it appears that this common sense interpretation is no longer being followed. This has been exacerbated by the introduction of MiFID II[162] at the start of 2018 and the interpretation by compliance officers of the guidance from the FCA. The impact is not only being seen in the hospitality area of business but also increasingly sponsorship, as hospitality is usually a significant element of any sponsorship package or partnership agreement … "[163]

126. We were told that stakeholders in sports sponsorship rarely explicitly cite the Bribery Act as a reason not to renew or partake in hospitality or sponsorship of a sport event, but that several firms have cited "legislation". Moreover, stakeholders have reported a decline in acceptance of hospitality invitations in the UK since the introduction of the Act. In many cases this has "necessitated combining the sponsorship of sporting events with the introduction of business conferences/seminars in order to facilitate attendance from both the public and private sectors, particularly where strict rules have been introduced to ensure compliance with the Act."[164]

127. Companies should bear in mind that certain sectors must abide by legislation which goes beyond the Bribery Act. For instance, companies involved in financial services are affected by MiFID II, EU legislation that regulates firms who provide services to clients linked to "financial instruments"

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161 The Chartered Institution of Building, *A report exploring corruption in the UK Construction Industry* (September 2013), p 11: https://www.ciob.org/sites/default/files/CIOB%20research%20-%20Corruption%20in%20the%20UK%20Construction%20Industry%20September%202013.pdf [accessed 7 January 2019]

162 The Markets in Financial Instruments Directive and Regulation: see Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU OJ L 173/349 (12 June 2014), implemented by the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (SI 2017/701), the Data Reporting Services Regulations 2017 (SI 2017/699), and the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017 (SI 2017/488); and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 OJ L 173/84, (12 June 2014)

163 Written evidence from the Major Event Organisers Association (BRI0013)

164 Supplementary written evidence from Michelle Crotty, Deputy Legal Secretary and Head of Operations at the Attorney General's Office, and Nicola Hewer, Director of Criminal and Family Justice Policy at the Ministry of Justice (BRI0049)

(shares, bonds, units in collective investment schemes and derivatives), and the venues where those instruments are traded.[165] The FCA takes a stern line on hospitality, believing that hospitality should be "conducive to business discussions", a criteria not met by "sporting or social events, e.g. golf, tennis, concerts". The FCA also states that certain activities like evening dinners, playing golf and attending rugby games, provided after participation in training events or conferences, are often not appropriate.[166] Regulated firms and their compliance officers therefore have no choice but to observe these guidelines.

128. MEOA have drawn attention to various instances where legislation has prevented members from undertaking corporate hospitality, with the sport industry presented as being especially affected. In one instance, the title sponsor of a major televised sporting event gave the receipt of a letter from the FCA warning about the giving of hospitality as the reason for not renewing their sponsorship. According to the MEOA, sports and arts event organisers are having to replace lost business "with their hands proverbially tied behind their back because of the attitudinal change to hospitality and sponsorship driven by compliance officers."[167] The MEOA cited the "overreaction" from compliance officers in implementing legislation, meaning event organisers are "suffering from significant unintended consequences of the 2010 Bribery Act and MiFID II" and would "greatly benefit from some further clarification, such as that provided by Kenneth Clarke in 2010."[168]

129. We are not aware of any judicial interpretation of sections 1 or 6 from a hospitality point of view. Although the Guidance is to some extent useful, this is not a substitute for judicial interpretation, and we sympathise with organisations which must decide for themselves where to draw the line between legitimately oiling the wheels of commerce and attempting to gain an unfair business advantage. As noted by the Joint Committee on the Draft Bribery Bill, businesses will often have to rely on prosecutors using their common sense in deciding what is legitimate and what is not.[169]

130. It may help if businesses look at the situation from the point of view of the recipient of hospitality: would the guests expect to be treated in this way whatever decision they might reach on the business in question, or would they believe that the level of hospitality offered was an attempt to influence them improperly into taking a decision which they might not otherwise have taken? Businesses might also consider what a reasonable member of the public, properly informed, might think of the hospitality they are proposing to offer. On a level closer to businesses, we encourage professional organisations and trade associations to provide sector specific guidance on where their members should draw the line.

131. **We believe the attempts in the Ministry of Justice Guidance to explain the boundary between bribery and legitimate corporate hospitality are as clear as can be expected in the absence of any**

165 Financial Conduct Authority, 'MiFID II', (May 2016): https://www.fca.org.uk/markets/mifid-ii [accessed 14 January 2019]

166 Financial Conduct Authority, 'Inducements and conflicts of interest thematic review: key findings': https://www.fca.org.uk/publications/thematic-reviews/inducements-and-conflicts-interest-thematic-review-key-findings [accessed 10 January 2019]

167 Written evidence from the Major Event Organisers Association (BRI0013)

168 Written evidence from the Major Event Organisers Association (BRI0013)

169 Joint Committee on the Draft Bribery Bill, *Draft Bribery Bill* (First Report, Session 2008–09, HC 430–I, HL Paper 115–I) p 52

judicial interpretation of these provisions. Nevertheless, initially the Act may have had an overly deterrent effect. The Ministry of Justice should consider adding to the Guidance clearer examples of what might constitute acceptable corporate hospitality.

CHAPTER 5: BRIBERY OF FOREIGN PUBLIC OFFICIALS, AND FACILITATION PAYMENTS (SECTION 6)

The offence

132. The scourge of corruption is not confined to Britain's shores, and for decades countries across the world have struggled to tackle bribery across borders. In 1989 the Organisation for Economic Co-operation and Development (OECD) established a working group to consider national legislation across member countries regarding the bribery of foreign public officials. This culminated in the signing of the OECD Anti-Bribery Convention[170] in 1997, which aimed to encourage countries to adopt legislation prohibiting the bribery of foreign public officials following a common framework, and monitor enforcement activities in this area. As at May 2017, 43 countries had ratified or acceded to the convention.[171]

133. The Convention was ratified by the UK on 14 December 1998, and entered into force on 15 February 1999. Provisions on foreign bribery were first integrated into UK law on 14 February 2002 when sections 108–110 of the Anti-terrorism, Crime and Security Act 2001 came into force.[172] Section 108 explicitly made bribing a foreign official an offence, primarily as a means of ensuring the UK was clearly compliant with the Convention.

134. Sections 108–110 were repealed and replaced by the Bribery Act. Under section 6, a person will be guilty of an offence if, with the intention of obtaining business or an advantage in the conduct of business, they offer, promise or give a financial or other advantage to a foreign public official, either directly or through a third party, where such an advantage is not legitimately due. Unlike section 1 and 2 bribery offences, there is no requirement to show that the public official acted improperly as a result. The offence under section 6 only applies to the briber, and not to the official who receives or agrees to receive such a bribe. Section 1, 2 and 6 offences carry the same maximum penalties.[173]

135. At the time of writing, no prosecutions have been brought under section 6, and, as far as the MoJ were aware, no investigations either.[174] This is not necessarily as surprising as it might initially seem—due to the extra-territorial scope of section 1 of the Act, a prosecution may be brought under section 1 for the same conduct as section 6, although the burden of proof would be higher, as noted earlier. Corruption Watch argued this point, and stated that:

> "the absence of prosecutions under Section 6 up to now does not necessarily reflect an absence of prosecutorial action being taken for this

170 OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 2011: http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [accessed 5 February 2019]; Organisation for Economic Co-operation and Development Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (March 2012) p 13: http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf [accessed 8 January 2019]

171 OECD, 'Ratification Status as of May 2017': http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf [accessed 4 March 2019]

172 The judgment of the Court of Appeal in *R v AIL, GH and RH* ([2016] EWCA Crim 2) indicates that bribery of a foreign official has always been covered by the UK's anti-bribery and corruption legislation, and ss. 108-110 of the Anti-terrorism, Crime and Security Act 2001 simply confirmed the position: http://www.bailii.org/ew/cases/EWCA/Crim/2016/2.html [accessed 23 January 2019]

173 See para 40.

174 Written evidence from the Law Society of England and Wales (BRI0025), Q 3 (Michelle Crotty)

> type of offending but rather the fact that other sections of the Bribery Act are already sufficient to criminalise the offending."[175]

136. Regardless of the section it is prosecuted under, any bribery case with an international dimension is likely to be handled by the SFO in the case of a large, complex case, or otherwise by the International Corruption Unit (ICU) of the NCA. These used to be handled primarily by the City of London Police's Overseas Anti-Corruption Unit (OACU). Set up in 2006 with funding from the Department for International Development, its remit was passed to the National Crime Agency's International Corruption Unit (ICU) in 2015. With relatively modest funding (£10 million since 2006), the OACU secured eight convictions during its existence, accounting for more than a third of the individual foreign bribery convictions in the UK since 1999.[176] None of the City of London Police's investigators transferred across to the new unit at the NCA, although they did help to establish an NCA training course for the investigation of foreign bribery cases, which every ICU officer is required to attend.[177]

137. When we asked NCA representatives why they had not yet secured any convictions, James Mitra noted that, to his knowledge, in the first four years of operation, the OACU only secured one conviction. Due to the complexities of foreign bribery cases, most of the OACU's convictions were secured after this point:

> "By comparison, the international corruption unit is three years in, and we are now at a point of having some cases considered by the CPS for charge. I feel like we are working to a similar arc."[178]

Facilitation payments

138. Facilitation payments are small payments, usually paid to minor officials to induce them to perform their public duties where otherwise they might not be inclined to do so, or would do so only very slowly. They are often expected in certain countries in relation to various routine administrative tasks, such as applying for visas, clearing customs or obtaining import licences, or unloading ships. In many such situations, it can seem that there are few practical alternatives to acceding to these demands. UK corruption law, both before and after the 2010 Act, has never distinguished facilitation payments from other forms of corrupt payments.

139. We received little in the way of clear evidence regarding the prevalence of facilitation payments. To take just one sector—shipping, in which facilitation payments might be assumed to be relatively commonplace—several industry representatives told the Committee that while large-scale bribes to secure business have been significantly reduced in recent years, facilitation payments remain an issue in various parts of the world. Mark Jackson, CEO of Baltic Exchange, told us that "smaller, low-level payments of less than $1,000, along with cartons of cigarettes and alcohol, have been harder to deal with", while Tim Springett, Policy Director for Employment and Legal at the UK Chamber of Shipping, suggested that shipping companies which operate in

175 Supplementary written evidence from Corruption Watch (BRI0044)
176 Corruption Watch, 'Who will catch the medium fish in foreign bribery cases?' (20 November 2017): www.cw-uk.org/single-post/2017/11/20/Who-will-catch-the-medium-fish-in-foreign-bribery-cases [accessed 4 March 2019]
177 Q 189 (James Mitra)
178 Q 189 (James Mitra)

"particular corruption hotspots, will face [demands] on a routine basis".[179] He highlighted the Suez Canal as one of these hotspots:

> "It is nicknamed the Marlboro Canal, because the pilots routinely expect to be provided with cartons of Marlboro—200 cigarettes—which they normally sell. We have heard reports of ships either being negligently piloted through the Suez Canal or perhaps even being deliberately damaged by pilots if they have not received these things."[180]

140. However, Cecilia Müller Torbrand, Program Director of the Maritime Anti-Corruption Network, argued that her network had taken "significant steps" in the canal, and companies which participated in their "Say no" campaign "are now going through the canal without being harassed for payments".[181]

141. The matter of whether specific exemptions should be made for facilitation payments was considered in the lead up to the Act, but both the Joint Committee and the Government declined to take this approach, arguing that tackling petty bribery was also an important objective for the legislation, and that prosecutorial discretion would ensure that prosecutions were in the public interest.[182]

142. MoJ guidance makes clear that anyone making facilitation payments could be liable for prosecution under sections 1 or 6 of the Act, but also acknowledges "the problems that commercial organisations face in some parts of the world and in certain sectors".[183] The Joint Prosecution Guidance of the DPP and DSFO also lists a number of factors which will help determine whether a prosecution is in the public interest–for example, if payments are made regularly and are pre-planned, a prosecution is more likely than if an occasional payment is made based on the immediate situation.[184]

143. Many of our witnesses mentioned that in some jurisdictions, notably the US, Canada, Australia and New Zealand, allowances have been made for types of facilitation payment.[185] However, it was also noted that many of these countries are themselves abandoning this position—Canada, for example, recently removed its facilitation payments exception, while Australia has considered doing so in its recent reforms of corruption law.[186] Indeed, in March 2018 an Australian Senate report on foreign bribery legislation reform observed that in the context of the "many comparator countries, including the UK and Canada, that do not permit facilitation payments … Australia's position on this issue is increasingly isolated", and recommended abolishing

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179 Q 120 (Mark Jackson and Tim Springett)
180 Q 121 (Tim Springett)
181 Q 121 (Cecilia Müller Torbrand)
182 Colin Nicholls et al, *Corruption and Misuse of Public Office*, 2nd edition (Oxford: Oxford University Press, 2011), p 99
183 Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing* (March 2011) p 18: https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf [accessed 16 January 2019]
184 Crown Prosecution Service, Legal Guidance, *Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions*, 30 March 2011: https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and#a05 [accessed 5 February 2019]
185 Written evidence from Eversheds Sutherland Intl LLP (BRI0024), Fraud Advisory Panel (BRI0020), Greenberg Traurig (BRI0026), IBLF Global (BRI0023)
186 Written evidence from Control Risks (BRI0014), Corruption Watch (BRI0039)

the facilitation payment defence.[187] It was also pointed out that while the US Foreign Corrupt Practices Act does allow for facilitation payments, the circumstances in which these are permitted are tightly circumscribed, and many US companies prohibit facilitation payments regardless of their legal permissibility.[188]

144. A minority of witnesses suggested that the fear that companies could be held responsible for even the smallest infractions "may discourage British companies from working abroad", and that some companies felt that "business was lost" as a result of the Act's strict provisions against bribery.[189] However, Control Risks gave evidence which pointed in the opposite direction.[190]

145. Most witnesses were very clear that any attempt to relax or amend the UK's approach to facilitation would be a backward step, with Transparency International speaking for many when they stated that "the UK has led the way, and the rest of the world has followed, and it is now too late to attempt to lower standards in a bid to lessen compliance requirements on companies".[191] Even witnesses who highlighted concerns amongst UK businesses were generally more in favour of providing additional assistance for companies, in particular exporters, who find themselves in difficulties abroad, rather than any change to the law.[192]

146. **We agree with all our witnesses that it would be a retrograde step to legalise facilitation payments. All trends in the law in other jurisdictions are towards abolishing a facilitation defence. We do not recommend any change in the law.**

Assisting SMEs

147. Much of the evidence we received did however convince us that exporters, especially SMEs exporting for the first time to new markets, need more assistance in formulating their anti-bribery and corruption policies. Several witnesses thought that current guidance and advice was lacking;[193] for example, Sean Curran noted that guidance was often blind to the needs of SMEs, which might require "a more fact-specific policy relevant to their business" which takes into account foreign elements of their business and the cultural sensitives of the markets in which they operate.[194]

148. There was much discussion regarding the level of assistance provided to exporters by UK embassies in foreign markets. Some witnesses were very happy with the help they received, with Joanna Talbot, Chief Counsel, Compliance and Regulation for BAE, explaining that they routinely sought their guidance on local markets, and found them to be a "very good source of

187 Australian Senate Economic References Committee,: *Foreign bribery* (March 2018), Chapter 7, paras 7.97 and 7.104: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th/Report [accessed 7 February 2019]
188 Written evidence from Control Risks (BRI0014)
189 Written evidence from Sean Curran (BRI0048) and IBLF Global (BRI0023)
190 Supplementary written evidence from Control Risks (BRI0060)
191 Written evidence from Control Risks (BRI0014), Eversheds Sutherlands (BRI0024), Greenberg Traurig (BRI0026), IBLF Global (BRI0023), Serious Fraud Office (BRI0018), Transparency International UK (BRI0003), UK Anti-Corruption Forum (BRI0009), Corruption Watch (BRI0039)
192 Written evidence from IBLF Global (BRI0023)
193 Written evidence from Baker McKenzie LLP (BRI0030), British Exporters Association (BRI0034), Fieldfisher LLP (BRI0005), the Law Society of England and Wales the City of London Law Society and the Fraud Lawyers Association (BRI0025)
194 Written evidence from Sean Curran (BRI0048)

help and assistance".[195] She believed these opportunities are "open to anyone who wants to take them", regardless of their size.[196]

149. However, Dominic Le Moignan, Director of Government Projects at GovRisk, which has worked with the Government on improving assistance for businesses in this regard, observed that their consultations with businesses highlighted a great variation in the advice provided by embassies, many of which are chronically short-staffed.[197] Similarly, IBLF Global stated they did "not believe that the UK Embassies, DIT representatives or British Chambers of Commerce are currently equipped to provide a service advising on corruption risk", and noted the lack of information concerning FCO commitments on training outlined in the Government's Anti-Corruption Strategy.[198] A variety of witnesses shared the view that advice and guidance on the ground should be provided by embassies on a more consistent basis.[199]

150. We were told of a range of current Government initiatives in this area. Phil Mason, Senior Anti-corruption Adviser at the Department for International Development (DfID), provided us with an outline of the Government's Business Integrity Initiative, which aims to convince businesses that anti-bribery measures are integral to sustainable commercial activity, provide businesses with better advice on where to turn if they are confronted with demands for facilitation payments, and shape the behaviour of SMEs more generally in relation to corrupt conduct.[200] It now encompasses six projects:

- Improving online guidance, as set out on the great.gov.uk website, by, for example, indicating potential red flags which businesses should look out for when exporting abroad and dealing with agents;
- Contracting with guidance services in order to provide businesses with bespoke face-to-face guidance on particular issues they might be encountering;
- Improving in-country support through missions and embassies;
- Improving mechanisms for informing and influencing the behaviour of SMEs, through, for example, the creation of an NGO called 'Business Fights Poverty';
- Analysis of what works with respect to successful collective action in tackling corruption, and using this to improve Government advice and guidance services;
- Convening an expert panel, under the Joint Anti-corruption Unit (JACU), to sustain collaboration between Government and business, and provide feedback on the work of the Business Integrity Initiative.

151. Baroness Fairhead, Minister of State for Trade and Export Promotion at the Department for International Trade (DIT), acknowledged that practical help to date had been "very siloed", and explained that DfID, the Foreign and Commonwealth Office and DIT have all produced their own guidance in an

195 Q 77 (Peter Carden), Q 77 (Keely Hibbitt), Q 57 (Dr Carl Hunter), Q 64 (Joanna Talbot)
196 Q 65 (Joanna Talbot)
197 Q 130 (Dominic Le Moignan)
198 Written evidence from IBLF Global (BRI0023)
199 Q 122 (Cecilia Müller Torbrand), Q 130 (Brook Horowitz), Q 57 (Lesley Batchelor), Q 41 (Susan Hawley)
200 Q 132 (Phil Mason)

un-coordinated way.[201] She highlighted an 18-month pilot project, covering Kenya, Mexico and Pakistan, which began in October 2018, which will see in-country personnel tasked with improving guidance on risk mitigation, compliance and prevention, and encouraging collective support.

152. **The Government must ensure that UK companies are provided with support on corruption issues in the countries to which they export, by properly trained and instructed officials. Even the smaller UK embassies must have at least one official who is expert in the local customs and cultures, or who can rapidly contact officials of foreign government departments on behalf of companies facing problems in this field.**

153. **There are specific issues with the DIT Exporting is Great website which we consider in Chapter 8.**[202]

Brexit issues

154. The United Kingdom currently participates in around 40 EU measures that support and enhance security, law enforcement and judicial co-operation in criminal matters. Some of these, including the European Arrest Warrant (EAW)[203] and the European Investigation Order (EIO),[204] are of particular importance in the investigation and prosecution of bribery offences, which often cross national borders.

155. The Political Declaration of 25 November 2018 on the future relationship of the EU and the UK[205] states that "effective arrangements based on streamlined procedures and time limits" should be established to allow the "surrender [of] suspected and convicted persons efficiently and expeditiously".[206] It also emphasises the need for "effective and swift data sharing and analysis", and states that "reciprocal arrangements for timely, effective and efficient" exchanges of criminal justice data should be established.

156. Nothing is said there about the problems which will arise if there are no EU measures in force and no multilateral agreements to replace them. However the Government has laid before Parliament draft Regulations—the draft Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019—which, in the event of "no deal", would bring into force on exit day

201 Q 193 (Baroness Fairhead)
202 Paras 346–351
203 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States (2002/584/JHA), OJ L 190 (18 July 2002)
204 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1 (1 May 2014)
205 Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, (25 November 2018): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom__.pdf [accessed 21 January 2019]
206 Political Declaration (25 November), para 89

alternative measures for the investigation of offences and enforcement of penalties.[207] The Explanatory Memorandum states that:

> "in a 'no deal' scenario there would not be an implementation period, and the UK would no longer be able to co-operate with the EU using EU law enforcement and criminal justice mechanisms such as the European Arrest Warrant (EAW) or the Schengen Information System (SIS II), a Europe-wide IT system which enables the sharing of alerts on wanted/missing persons and objects for law enforcement purposes. The UK would rely instead on alternative, non-EU mechanisms, where they exist. The assessment concludes that these mechanisms, which include Interpol and Council of Europe Conventions, would not provide the same level of capability as those envisaged in a deal scenario, and would risk increasing pressure on UK security, law enforcement and judicial authorities."[208]

157. The EAW was implemented in the UK by Parts 1 and 3 of the Extradition Act 2003 which came into force on 1 January 2004. It allows a Member State to issue a single warrant which is valid across all EU Member States, and requires Member States to arrest and transfer a criminal suspect to the issuing state.

158. The EIO was implemented in the UK by the Criminal Justice (European Investigation Order) Regulations 2017 which came into force on 31 July 2017 (the EIO Regulations).[209] It replaced previous mechanisms for requesting and sharing evidence through Mutual Legal Assistance between EU Member States, and requires that Member States recognise a request within 30 days and execute a request within 90 days, although extensions can be sought. The possible requests covered include:

- temporary transfer of persons in custody in order to gather evidence;
- checks on the bank accounts and financial operations of suspected or accused persons;
- covert investigations and intercepting telecommunications; and
- measures to preserve evidence.

159. If the UK ceases to be a Member State, it can continue to respond to requests under the EIO from the other 25 participating states,[210] and indeed must respond as long as Part 3 of the EIO Regulations remains in force;[211] but those 25 states will not be obliged to respond to requests from the UK unless there is an agreement that they should do so.

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207 Draft Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019. The Secondary Legislation Scrutiny Committee (Sub-Committee A) drew this instrument to the special attention of the House on the ground that "Effective scrutiny is further inhibited by the failure of the Home Office to provide any contextual explanation, with estimated numbers or an indication of the degree of usage, to illustrate the impact of the changes that this instrument addresses." Secondary Legislation Scrutiny Committee (Sub-Committee A), *Draft Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019* (17th Report, Session 2017–19, HL Paper 292)

208 Explanatory Memorandum to the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019, para 7.

209 The Criminal Justice (European Investigation Order) Regulations 2017 (SI 2017/730)

210 The 27 less Ireland and Denmark which did not opt in. They are listed in Schedule 2 to the EIO Regulations.

211 In the event of "no deal" the EIO Regulations would be revoked from exit day by Regulations 73–74 of the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019.

160. Several witnesses highlighted the importance of the EAW and the EIO when conducting international bribery investigations, and were concerned at the uncertainty surrounding them post-Brexit. Peters and Peters said: "considering complex bribery investigations are almost invariably international in nature, a return to using Mutual Legal Assistance for all requests will act as a brake on investigations."[212] The Law Society of England and Wales, the City of London Law Society and the Fraud Lawyers Association argued that "if the security arrangement that the UK comes to does not include the retention of the ability to use the EIO, that will amount to a step backwards for law-enforcement generally and the enforcement of bribery and corruption laws in particular", with the same applying for the EAW.[213] Gillian Mawdsley highlighted membership of European organisations such as Eurojust and the European Judicial Network as significant issues worthy of consideration in any eventual deal.[214]

161. In supplementary written evidence Louise Hodges pointed out that the Framework for the EU-UK Security Partnership proposed by the Government in May 2018[215] sought to incorporate and replicate existing arrangements such as the European Arrest Warrant, and to provide the UK with access to the Second Generation Schengen Information System database (SIS II), as well as some form of continued participation in Europol and Eurojust. The Government had also suggested that it hoped to maintain some form of access to the European Criminal Records Information System (ECRIS) database, the Passenger Name Record (PNR) database and the Prüm databases containing fingerprint, DNA and vehicle registration information.[216] No progress has however been made with the proposed Security Partnership.

162. When asked during an oral evidence session about the possible impact of Brexit on bribery investigations, Max Hill QC, the Director of Public Prosecutions, said:

> "There would be an impact, because we would need to fall back on the mutual co-operation instruments that were in place prior to the EIO, which has been in force for only a year, and the EAW … it is important to say, from the point of view of the Crown Prosecution Service, that there could very well be resource implications depending on where we end up with Brexit. As a prosecuting authority for all crime nationwide, we are preparing for every outcome, whether that is deal or no deal. We understand that the demise of the EIO and the EAW would require 27 bilateral arrangements as opposed to a single multilateral one. We have procedures in place. We are managing our resources as best we can to prepare and protect the organisation in that event. This summer we created three new fraud centres to prepare for the future in general, and Brexit is part of the future."[217]

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212 Written evidence from Peters and Peters (BRI0028)

213 Written evidence from the Law Society of England and Wales, the City of London Law Society and the Fraud Lawyers Association (BRI0025)

214 Q 84 (Gillian Mawdsley). James Mitra of the NCA also highlighted at least one case in which a joint investigation team—an instrument made possible by membership of Eurojust—was used to facilitate a recent UK investigation into bribery in a third, non-EU member country. Q 185 (James Mitra).

215 HM Government, *Framework for the UK-EU Security Partnership* (May 2018): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705687/2018-05-0_security_partnership_slides__SI__FINAL.pdf [accessed 6 February 2019]

216 Supplementary written evidence from Louise Hodges (BRI0054)

217 Q 161 (Max Hill QC)

163. Lisa Osofsky agreed with this assessment, although she also stressed that the SFO had a close working relationship with European counterparts, which she hoped would persist after Brexit.[218] Donald Toon, Director of Prosperity at the NCA, emphasised that many investigations rely on police-to-police contact, which occurs with countries all over the world, and should therefore be relatively unaffected by Brexit. However, he emphasised that "we would want to preserve [existing] capabilities as much as we could" in the form of the EAW, EIO and the Schengen Information System under any deal that is reached.[219]

164. When the Protocol 36 negotiations were taking place in 2013–14[220] the Government acknowledged the importance of opting back in to the EAW, pointing out that the only alternative multilateral agreement, the Council of Europe 1957 European Convention on Extradition (ECE), did not allow for extradition for political offences, and allowed states to refuse to extradite their own nationals. Keir Starmer QC (then DPP, and now Sir Keir Starmer QC MP) in evidence to the European Union Committee, stressed that the time and cost of extradition would significantly increase, and emphasised the problems caused by the fact that many Member States had repealed their legislation implementing the ECE in their countries, so that it would not be possible to use it for extradition to or from those countries.[221] This is not a matter addressed in the draft Regulations, which simply add the 27 Member States to the list of territories designated for the purposes of the Extradition Act 2003.[222]

165. Ministers acknowledged in evidence to us the importance of the EAW and EIO, and highlighted efforts to negotiate similar arrangements with the European Commission.[223] Ben Wallace MP emphasised that more resources were being allocated to a variety of law enforcement-related activities to prepare for Brexit (see Table 3). However, he was clear that "if there is a no deal, I think we will be in a very much worse position", noting:

> "Some people do not realise that we will be shut out of these arrangements; it is not a case of whether the European Union member states wish us to belong to them. Certainly in the short term we will become a third country overnight, and as such we will not have access to the European Arrest Warrant. That is a fact, whether people wish it to be so or not, and it would have a degrading effect on our ability, as would being without ECRIS on criminal records and passenger name records, and all the other things that we would be shut out of pretty much overnight."[224]

218 Q 161 (Lisa Osofsky)
219 Q 188 (Donald Toon)
220 Protocol 36 to the EU Treaties, inserted by the Treaty of Lisbon, required the UK within 5 years of the entry into force of the Treaty of Lisbon either to adopt all the pre-Lisbon EU legislation in the field of police and criminal justice, or to opt out of all those measures and to negotiate to opt back in to those it wished to continue to be party to.
221 Oral evidence taken before the Justice and Home Affairs Sub-Committees of the European Union, 6 February 2013 (Session 2012–2013), QQ 209–228
222 Regulation 56 of the Draft Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019
223 Q 196 (Ben Wallace MP)
224 *Ibid.*

Table 3: As of 19 December 2018, the Treasury had allocated the following additional funds to help departments prepare for Brexit

Department	2018/19 (£m)	2019/20 (£m)
Attorney General's Office	-	3
Department for Business, Energy and Industrial Strategy	185	190
Department for International Trade	74	128
Foreign and Commonwealth Office	30	45
Home Office	395	480
Ministry of Justice	17	30

Source: Supplementary written evidence from HM Government (BRI0059)

166. **It is clear that the fight against international bribery will be significantly impeded if there are not in force between the United Kingdom and the participating Member States of the EU, even for a short time, measures with equivalent effect to the European Arrest Warrant, the European Investigation Order and other EU mechanisms for investigation and enforcement. We hope that all those involved in the Brexit negotiations, for the EU as well as the UK, will bear this in mind.**

CHAPTER 6: FAILURE TO PREVENT BRIBERY (SECTION7)

167. Companies are creatures of statute. They are not corrupt, they do not have consciences, they do not show remorse. But they, and their shareholders, can benefit hugely from the corrupt conduct of their agents, their employees and their directors, sometimes at the highest levels. The problem of how they can be punished for the conduct of perhaps a tiny minority of those involved, without at the same time harming the great majority who have played no part in the corrupt activities, is one which has exercised lawmakers for many years. It is one which the Law Commission sought to resolve by making it an offence for a commercial organisation to fail to prevent bribery.

The offence

168. The Law Commission was not the first to formulate such an offence. Article 3(2) of the Second Protocol of the Convention on the protection of the European Communities' financial interests, dated 19 June 1997, reads:

> "Apart from the cases already provided for in paragraph 1,[225] each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1[226] has made possible the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority." [227]

169. In its second consultation paper the Law Commission pointed out[228] that this formed the basis for Article 18(2) of the Council of Europe Criminal Law Convention on Corruption, which copied it almost verbatim, as subsequently did Article 5(2) of the [EU] Council framework decision of 22 July 2003 on combating corruption in the private sector.[229] The Law Commission described this as "a relatively specialised form of liability", and explained that neither the Council of the European Union, in drawing up the Second Protocol, nor the Council of Europe in copying the provision into the Convention, had assumed that this would necessarily entail criminal sanctions; "administrative and civil law measures are possible as well".[230] The consultation paper then asked for views on whether there should be a new criminal offence of failing adequately to supervise, or whether a new civil or administrative provision would suffice.

170. The views of the few consultees who responded were inconclusive. The Law Commission considered further, in particular with officials of the OECD, whether a criminal offence would be desirable, and concluded: "we believe that the introduction of our recommended offence would banish any doubt that there might be over the adequacy of the existing law, respecting European Convention requirements regarding the combating of bribery

225 Liability of legal persons for fraud, active corruption and money laundering.

226 "any person, acting either individually or as part of an organ of the legal person, who has a leading position in the legal person"

227 Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests (97C 221/02), OJ C 221 (19 July 1997), p 11

228 Law Commission, *Reforming Bribery: A Consultation Paper*, CP185 (2007), paras 9.38-9.40: http://www.lawcom.gov.uk/app/uploads/2015/03/cp185_Reforming_Bribery_consultation.pdf [accessed 5 March 2019]

229 Council framework decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192 (31 July 2003), p 54

230 Explanatory Report on the Second Protocol to the Convention on the protection of the European Communities' financial interests, OJ C 091, (31 March 1999), para 4.3.

committed or tolerated by companies."[231] Clause 7 of the draft Bill annexed to the Law Commission report accordingly created the offence of failure by commercial organisations to prevent bribery. The drafting of the clause was substantially amended for the draft Bill prepared for the Joint Committee in March 2009,[232] and further amended (though less significantly) for the Bill introduced in the House of Lords on 19 November 2009. It reached the statute book without further amendment, and reads:

> **Failure of commercial organisations to prevent bribery**
>
> "(1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
>
> (a) to obtain or retain business for C, or
>
> (b) to obtain or retain an advantage in the conduct of business for C."

171. The creation of an offence of failure by a commercial organisation to prevent bribery was an unprecedented way of enlisting the support of those most susceptible to being involved in the offence and most able to aid in its prevention. It is generally agreed to have been remarkably successful, and was described by Transparency International UK as "invaluable as a tool to incentivise improvements in corporate behaviour and for prosecutors to hold companies to account within a criminal law framework."[233] The Criminal Finances Act 2017 has followed this example with the offences of failure to prevent facilitation of UK and foreign tax evasion.

Due diligence: the 'adequate procedures' defence

172. The Law Commission had never intended that the new offence should be one of strict liability, but the Consultation Paper only touched on how a defence might be framed.[234] The Law Commission waited until its report to consider more fully what should constitute a defence. It gave as an example the due diligence defence in section 21(1) of the Food Safety Act 1990:

> "In any proceedings for an offence under any of the preceding provisions of this Part … it shall … be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or by a person under his control."[235]

173. The Law Commission concluded:

> "A company should not be liable for a serious offence, such as failure to prevent bribery, on the basis of a single instance of carelessness, if it can

231 Law Commission, *Reforming Bribery,* (Report No. 313) 19 November 2008, paras 6.70–6.71: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/231183/0928.pdf [accessed 17 January 2019]

232 Ministry of Justice, *Bribery: Draft Legislation,* Cm 7570, March 2009: https://www.gov.uk/government/publications/ministry-of-justice-bribery-draft-legislation-march-2009 [accessed 17 January 2019]

233 Written evidence from Transparency International UK (BRI0003)

234 Law Commission, *Reforming Bribery: A Consultation Paper*, CP185 (2007), paras 9.38–9.40: http://www.lawcom.gov.uk/app/uploads/2015/03/cp185_Reforming_Bribery_consultation.pdf [accessed 5 March 2019]

235 Law Commission Report, *Reforming Bribery* (Report No. 313), 19 November 2008, para 6.97: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/04/lc313.pdf [accessed 4 March 2019]

show that it had robust management systems in place to prevent bribery taking place. Clause 7(6) of the draft Bill makes it a defence to show that there were such systems in place." [236]

174. Clause 7(6) of the draft Bill annexed to the Report read:

> "Except as provided in subsection (7), it is a defence to a charge under this section to prove that C had in place adequate procedures designed to prevent persons performing services for or on behalf of C from committing offences under section 2 or 4."

175. The wording of the provision in the draft Bill presented to Parliament in March 2009 for consideration by the Joint Committee was almost identical,[237] but (like the remainder of section 7) this subsection was re-drafted for the Bill introduced in November 2009, and was not further amended during the passage of the Bill. Section 7(2) now provides:

> "But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct."

176. Under the Bribery Act there is no substantive requirement for commercial organisations to have anti-bribery procedures. It is not an offence to have no such procedures in place, but it is very much in a company's interest to do so; if it does not have adequate procedures in place, it will have no defence when an associated person bribes another person on behalf of the company. Companies which might previously have been unconcerned at being involved with bribery (even if at one remove) which assisted their business, now have every incentive to put in place procedures to prevent this happening.

177. By contrast, as PwC pointed out,

> " … in some other jurisdictions a positive obligation has been imposed. France's Sapin II law is perhaps the most closely scrutinised example of this from a UK perspective. This came into force on 1 June 2017 and establishes a strict positive obligation on French companies to 'prevent corruption.' Companies with over 500 employees or an annual turnover in excess of EUR 100m are expected to implement an appropriate internal ABC risk management framework, with the company and its directors held accountable by the newly created Agence Française Anticorruption (AFA). Ultimate sanctions for breach include fines for a legal person of up to EUR 1m and for individuals up to EUR 200,000 and the right for the authorities to publicise both the failure and fine."[238]

The Guidance

178. Section 9(1) of the Bribery Act provides: "The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1)". The Guidance published by the Ministry of Justice in March 2011 goes wider than this, giving the Government's views

236 *Ibid*, para 6.106
237 Ministry of Justice, *Bribery: Draft Legislation*, Cm 7570, March 2009, clause 5(4): https://www.gov.uk/government/publications/ministry-of-justice-bribery-draft-legislation-march-2009 [accessed 17 January 2019]
238 Written evidence from PwC (BRI0031)

on the offences created by sections 1, 2 and 6, on hospitality and facilitation payments, on what constitutes a "relevant commercial organisation" and what is an "associated person".

179. The Guidance then sets out Six Principles which the Government considers should guide commercial organisations when putting in place procedures to prevent bribery.

Box 3: The Six Principles for the prevention of bribery

Proportionate procedures: A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

Top-level commitment: The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Risk Assessment: The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Due diligence: The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Communication (including training): The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

Monitoring and review: The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

180. Each of these Six Principles is explained in some detail, and they are followed by case studies explaining how the principles might apply in different hypothetical situations. Throughout the Guidance there is emphasis on proportionality: what is necessary for a large company will not necessarily be essential for a smaller company. What is needed by a company exporting to countries with poor corruption records will not necessarily be needed by companies doing little or no exporting. Iskander Fernandez, who spoke to us about the Skansen case which we discuss below, was emphatic that:

> "you need to have a bespoke policy in place. You cannot have a generic policy that you simply pull off the internet and say, 'This is it.' … If that generic policy does not cover off specifics in your organisation, if a company were to be investigated that could be its downfall, simply because it was not sufficient for the business activity it was carrying out."[239]

239 Q 205 (Iskander Fernandez)

181. We have mentioned that section 7 of the Bribery Act has been used as a model in the Criminal Finances Act 2017 for the offences of failure to prevent facilitation of UK tax evasion offences and failure to prevent facilitation of foreign tax evasion offences created by sections 45(1) and 46(1) of that Act respectively. Section 45(2) and section 46(3) provide:

> "It is a defence for B [a relevant body] to prove that, when the [UK] [foreign] tax evasion facilitation offence was committed—
>
> (a) B had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or
>
> (b) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place."

Two significant differences appear. First, these defences refer to procedures "reasonable in all the circumstances" rather than the "adequate procedures" of section 7(2) of the Bribery Act. We discuss this in detail below. Secondly, section 7(2) does not have an equivalent to paragraph (b); the question whether there may be circumstances in which it is adequate to have no procedures at all in place for the prevention of bribery is left open.

182. Section 47 of the Criminal Finances Act 2017, like section 9 of the Bribery Act, requires the minister—here the Chancellor of the Exchequer—to publish guidance about procedures relevant bodies can put in place to prevent associated persons from committing tax evasion facilitation offences. When section 9 of the Bribery Bill was passing through Parliament, unsuccessful attempts were made to make the Guidance subject to Parliamentary approval. However section 47(4) of the 2017 Act provides that the Guidance prepared by HMRC "does not come into operation except in accordance with regulations made by the Chancellor by statutory instrument."[240]

183. The HMRC Guidance[241] follows the same pattern as the Bribery Act Guidance, with the same Six Principles. Both sets of Guidance include useful commentaries with each of the Six Principles, and both supplement this with a number of case studies showing how the provisions of the relevant Act might apply in a number of different situations. The HMRC Guidance gives more detailed examples. Although it begins with the caveat that "Ultimately only the courts can determine whether a relevant body has *reasonable prevention procedures* in place to prevent the facilitation of tax evasion in the context of a particular case," it is not afraid to state in terms that particular facts will or will not constitute offences, and to conclude (to give only one example), that

> "Gladstone Bank may struggle to mount a reasonable prevention procedures defence, its procedures were arguably not reasonable because it had only implemented procedures for a small number of UK-based staff. It is no defence to claim that it should not be expected to put in place prevention procedures designed to prevent its associated persons from being complicit in fraud resulting in a tax loss outside of Switzerland."[242]

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240 The Facilitation of Tax Evasion Offences (Guidance About Prevention) Regulations 2017 (SI 2017/876), which brought the Guidance into force on 30 September 2017.

241 HM Revenue & Customs, *Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion* (1 September 2017): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf [accessed 21 January 2019]

242 *Ibid.*, p 34

184. For companies, especially small companies, which are setting up anti-bribery procedures, and trying to decide whether they are "adequate", these examples and conclusions are helpful. In the Bribery Act Guidance each case study states only in very general terms that the company might in the particular situation "consider any or a combination of the following" steps. We appreciate that it is difficult for the Guidance to state that any particular combination of steps would be adequate, but it would help to say that a failure to take at least specified listed steps would be likely to result in procedures being inadequate.

185. The HMRC Guidance also contains a number of passages aimed specifically at SMEs which have no equivalent in the Bribery Act Guidance, including:

> "Burdensome procedures designed to perfectly address every conceivable risk, no matter how remote, are **not**[243] required. Procedures need only be reasonable given the risks posed in the circumstances. It is expected that a relevant body will therefore first undertake an assessment of the risks that those who act on its behalf may criminally facilitate tax evasion …"[244]

and:

> "To be 'reasonable', prevention procedures should be proportionate to the risks that the organisation faces … The size of the organisation will be an important factor, as will the nature and complexity of its business, but size will not be the only determining factor."[245]

186. Some of the case studies in the Bribery Act Guidance refer specifically to small companies, but the conclusions do not seem to us to take particular account of the fact that in the case of SMEs simpler procedures may still be adequate. In their written evidence Fieldfisher said:

> "The guidance published by HMRC … sets out that in some circumstances it may be unreasonable to expect a business to put preventative procedures in place.[246] This would be, for example, where the business' risks are assessed to be extremely low and the costs of implementing procedures disproportionate. There is no such statement in the guidance to the [Bribery] Act, which effectively says no matter how low an organisation's risk may be it still needs to put in place some form of procedures. We recommend that the guidance is amended to make it clear that having no procedures in place may be acceptable for some businesses."[247]

187. Some witnesses felt that the Guidance was sufficiently clear,[248] and Eversheds Sutherland thought that "The Ministry of Justice should not invest scarce resources in amending or updating its Guidance on the Act."[249] But they

243 Emphasis in the original.
244 *HMRC Guidance*, p 21
245 *Ibid.*
246 *HMRC Guidance*, p 24. This reflects paragraph (b) of the defence in sections 45(2) and 46(3) of the Criminal Finances Act 2017.
247 Written evidence from Fieldfisher (BRI0005)
248 For example Greenberg Traurig (BRI0026).
249 Written evidence from Eversheds Sutherland (BRI0024)

were in a minority; many thought the Guidance should be reviewed and updated.[250] Transparency International UK wrote:

> "It would be helpful to provide a range of case studies that were relevant to various businesses, in particular for small to medium enterprises (SMEs) which typically operate their businesses with less formal and structured policies and procedures and often will be less well set up to manage bribery and corruption risk."[251]

188. We agree with these witnesses that the Bribery Act Guidance should be revised. In doing so, officials should bear in mind that larger companies will have their own advisers to help them decide what procedures are adequate; the Guidance should be directed primarily at SMEs. Consultation with organisations representing SMEs will be important, and a comparison with the HMRC Guidance will be helpful.

189. In addition to the statutory guidance, the Ministry of Justice issued before the entry into force of the Act what it called a "Quick Start Guide"[252] to the Act which includes the following passage:

> "Do I need complex procedures in place even if there is no risk? No. If there is very little risk of bribery being committed on behalf of your organisation then you may not feel the need for any procedures to prevent bribery."

190. It seems to us that the views of the Ministry of Justice in this Guide must bear no less weight than those in the Guidance the department was required to provide by statute, since neither document required or received parliamentary approval. Nevertheless it would be convenient for readers of the statutory Guidance if, when it is amended, a statement to the same effect could be incorporated.

191. It is potentially confusing to have the two Guides in force simultaneously. Once the statutory Guidance has been amended, it would be appropriate to withdraw the Quick Start Guide.

192. We stress the importance for even the smallest companies of carrying out a properly documented risk assessment. Without this, they will not be in a position to decide whether they have a low, or no, risk of bribery, so that they do not need to put anti-bribery procedures in place. They will need to carry out a re-assessment if their business changes. Transparency International UK is among bodies providing useful advice on risk assessment.[253]

193. **The Ministry of Justice should, in consultation with representatives of the business community, and especially of SMEs, expand the section 9 Guidance to give more examples and to suggest procedures which, if adopted by SMEs, are likely to provide a good defence.**

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250 For example, Baker McKenzie (BRI0030), Clifford Chance (BRI0036), Peters and Peters (BRI0028) and the Law Society of England and Wales, City of London Law Society and Fraud Lawyers Association (BRI0025)

251 Written evidence from Transparency International UK (BRI0003), para 3.4.2

252 Ministry of Justice, *The Bribery Act 2010: Quick start guide* (February 2012) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/181764/bribery-act-2010-quick-start-guide.pdf [accessed 21 January 2019]

253 Transparency International UK, *Diagnosing Bribery Risk: Guidance for the Conduct of Effective Bribery Risk Assessment* (July 2013): https://www.transparency.org.uk/publications/diagnosing-bribery-risk/ [accessed 21 January 2019]

194. **The Guidance should make clear that all businesses need to conduct a risk assessment, that all but the smallest are likely to need procedures tailored to their particular needs, and that staff will need to be trained to understand and follow those procedures.**

195. **Once that Guidance has been amended, the Quick Start Guide should be withdrawn.**

Adequate v reasonable

196. As we have explained above, the drafts of the due diligence provision in the Bill annexed to the Law Commission's second report, in the draft Bill presented to the Joint Committee in March 2009, and in the Bill introduced in November 2009, all include the words "adequate procedures", and these words are now on the statute book.[254] Among the dictionary synonyms for "adequate" are "acceptable", "satisfactory" and, most significantly, "reasonable".

197. From the discussion of the due diligence provision in paragraphs 6.105–6.125 of its second report, it is clear that the Law Commission did not intend by its use of the word "adequate" to deprive a company of a defence solely because a person associated with the company bribed another person in order to obtain business for the company. And this is followed by "two examples of carelessness leading to the commission of bribery that, in all probability, even an adequate preventative system could not reasonably be expected to have stopped in advance."

198. The Joint Committee considered the wording, and noted that "there was near-unanimous agreement in evidence that the meaning of 'adequate procedures' in clause 5 will require amplification through guidance",[255] but nowhere was it suggested that the wording should be changed.

199. Although, as we have said, Clause 7(2) of the Bill as introduced on 20 November 2009 was unchanged throughout the passage of the Bill through both Houses up to Royal Assent on 8 April 2010, unsuccessful attempts were made to amend it during its passage through the House of Lords both in Grand Committee and on Report. On the latter occasion the amendment moved was to replace "adequate procedures" with "reasonable procedures in all the circumstances".[256] The argument on each occasion was that the wording in effect provided no defence, because the fact that bribery had taken place *ex hypothesi* proved that the procedures in place, however robust, were inadequate. A further unsuccessful attempt was made when the Bill was in Committee in the House of Commons.[257]

200. We have set out above the wording of the analogous provisions in sections 45(2) and 46(3) of the Criminal Finances Act 2017 which refer to procedures "reasonable in all the circumstances" rather than the "adequate procedures" of section 7(2) of the Bribery Act. The earliest reference to "reasonable" procedures in the context of facilitating tax evasion comes in the consultation

254 Paras 168–75 above

255 Joint Committee on the Draft Bribery Bill, *Draft Bribery Bill* (First Report, Session 2008–09, HC 430–I, HL Paper 115–I), para 91

256 HL Deb, 2 February 2010, cols 138–143. Amendment 9 moved by Lord Henley on Report.

257 HC Deb, 16 March 2010, cols 55–70. Amendment 12 moved by Jonathan Djanogly MP in Committee, 2nd Sitting.

document *Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion*[258] which states:

> "The introduction of s.7 of the Bribery Act 2010 made it a criminal offence for a commercial organisation to fail to prevent bribery by a person associated with the commercial organisation. The s.7 model has been recognised as an effective response to corporate commercial bribery. It incentivises companies to put in place adequate procedures and promotes corporate good governance.
>
> In the context of the facilitation of tax evasion, the Government believes that it is right for corporations to take reasonable steps to prevent its agents from facilitating tax evasion. In the same way that a professional who dishonestly assists a customer to evade tax is guilty of the tax offence in which he or she becomes complicit, the Government believes that the corporation which employs this professional and fails to take reasonable steps to prevent their offending should also face prosecution. Many of the corporations that will be affected by this new legal requirement will be familiar with the Bribery Act. We believe that the Bribery Act s.7 offence offers the best model for a new failure to prevent the facilitation of tax evasion offence, and it will help to ensure consistency and minimise the burdens on corporations."[259]

201. The officials involved in formulating the policy for the new offences were thus aware of the wording of section 7 of the Bribery Act but, presumably deliberately, chose different wording. There is nothing to suggest that they did so because they were seeking to achieve a different result; on the contrary, they seem to have chosen the wording they preferred believing that its meaning was the same and that it would achieve the same result. But the consequence is seen by many lawyers as confusing. Peters and Peters wrote:

> "Parliament has introduced two pieces of criminal legislation based on the same model of corporate criminality … Both encourage compliance programmes designed to (a) address the risks faced by a business and (b) provide a defence in the event of breach. However, the standard against which each is judged is different. … The rationale is not immediately apparent, and potentially confusing."[260]

202. We are not aware of any judicial interpretation of either "adequate procedures" or "procedures … reasonable in all the circumstances". In his judgments in two of the DPA cases[261] Sir Brian Leveson, the President of the Queen's Bench Division, referred to "adequate procedures", but in neither case did he have to interpret the expression, since on their own admission both companies' procedures were inadequate by any standard. However when Sir Brian was giving oral evidence we suggested to him that "'adequate' would be construed by a judge as meaning, in effect, "reasonable in all the circumstances". Sir Brian said that he would be very happy to accept this

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258 HMRC, *Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion*, 16 July 2015 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445534/Tackling_offshore_tax_evasion_-_a_new_corporate_criminal_offence_of_failure_to_prevent_facilitation_of_tax_evasion.pdf [accessed 4 March 2019]

259 *Ibid.*, paras 2.18–2.19

260 Written evidence from Peters and Peters Solicitors (BRI0028)

261 Standard Bank plc and XYZ. See Chapter 7 for a full explanation.

articulation if it came to be argued in court, though the point had never been argued in front of him.[262]

203. Ultimately it is only the courts which can decide whether in this context there is a difference in meaning between "adequate" and "reasonable in all the circumstances", and if so what that difference is. The wording was considered by the jury in the Skansen case.[263] Iskander Fernandez told us that "Under the heading, 'What Skansen must prove and to what standard', the judge[264] said to the jury: 'That is for you to decide, and the words 'adequate' and 'procedures' have their everyday meaning. If you are sure of what the prosecution must prove, it is for Skansen to show on a balance of probabilities—i.e. that it is more likely than not—that it had adequate procedures in place designed to prevent persons associated with the company from engaging with bribery.' "[265] The jury found the company guilty, from which it is clear that they did not consider the company to have implemented procedures which were adequate. But there is no way of knowing whether they might have come to a different conclusion if they had had to decide whether the procedures Skansen had in place were "reasonable in all the circumstances".

204. This is an issue on which we have received a large volume of evidence. There are those who believe that retaining the word "adequate", especially when compared with "reasonable" in an analogous statutory provision, risks depriving the defence of any substance. In oral evidence Eoin O'Shea, a partner in Reed Smith LLP, and Chair of the Corporate Crime and Corruption Committee of the City of London Law Society, explained:

> "The fact that the predicate offence has taken place or been established—an offence under section 1 or section 6, which is required before a section 7 offence can be shown—must mean that the procedures are not adequate because the bribery has taken place. That has to be wrong as a matter of analysis, because if it were right it would deprive the defence of all efficacy."[266]

205. One of the strongest arguments for change came from Professor Jonathan Rusch, a former Deputy Chief for Strategy and Policy in the Fraud Section of the Criminal Division of the United States Department of Justice (DOJ) and now Adjunct Professor at Georgetown University Law Center in Washington, DC. He wrote:

> "The most specific challenge that companies face in anti-bribery and corruption compliance is that the "failure to prevent" language of section 7 continues to create uncertainty about whether their procedures will be considered "adequate" in the eyes of a judge or jury if, despite their best efforts, an executive or manager engages in a single act of bribery. The Ministry of Justice Guidance does state (p. 15) that "the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing." The fact remains, as the Standard Bank resolution shows, that even

262 Q 153 (Sir Brian Leveson)
263 See paragraphs 218–226 below.
264 Her Honour Judge Deborah Taylor
265 Q 207 (Iskander Fernandez)
266 Q 136 (Eoin O'Shea)

> a single case of bribery is sufficient to lay the ground for a section 7 prosecution.[267] Companies therefore remain concerned that if a single act of bribery slips through their compliance procedures, no matter how elaborate and well-supported by senior management they may be, a jury will conclude that by definition the procedures were "inadequate" and reject the company's affirmative defense."[268]

206. Professor Rusch would like to see "adequate" replaced by "reasonable", but added: "Even if the Committee is disinclined to revise the text of section 7 to reduce that inherent vagueness, it should at least urge the Ministry of Justice to amend its Guidance to state more specifically the importance of a company's providing sufficient resources to make its anti-bribery compliance program effective."

207. Another strong critic was the Aerospace Defence Security and Space Group, the trade body for those industries:

> "The 'adequate procedures' defence … is palpably not working … Our assessment is that no Company can feel totally confident to put forward such a defence as it is hard to think of a scenario when it would have much chance of being successful. … As was stated by Industry representatives as the Bill was going through Parliament, companies like certainty and the 'adequate procedures' defence falls far short of that."[269]

These witnesses, and many others,[270] would like to see the Act amended, and "adequate" replaced by "reasonable".

208. Deloitte took a more nuanced view: "The DPA judgments published to date have suggested that the term 'adequate procedures' …. should be read widely, potentially meaning 'adequate to prevent that particular bribery' rather than the broader sense of 'adequate in the context of the business and its risks'."[271] They point out that the judgments focus on whether policies and procedures are effective in influencing actions and behaviour, not simply on whether a policy or training exists or has been read or taken by the relevant people. In the Standard Bank case,[272] the agreed Statement of Facts says: "Although [the bank] did have a relevant training system in place for its employees, the effectiveness of the training provided must be in doubt given that no … deal team member raised any concern …"

209. It is clear that, as we were told by Edward Argar MP, "it was not intended that the law should come down on well run companies just because there have been instances of bribery." All the preparatory work of the Law Commission that we have cited, and statements by Ministers during the passage of the

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267 We note that while this was indeed a single case it was a particularly high risk transaction, involving as it did the Government of Tanzania and a "local partner" which included amongst its shareholders/directors the Commissioner of the Tanzanian revenue authority. There was no tender and no documented due diligence on the local partner and no evidence of services provided to justify the US$6m fee which was paid into an account opened for the local partner by Standard Bank's subsidiary. See further Chapter 7, paras 250–53.

268 Written evidence from Professor Jonathan Rusch (BRI0017)

269 Written evidence from Aerospace Defence Security and Space Group (BRI0037)

270 For example, UK Finance (BRI0015), Q 162 (Amanda Pinto QC, Neil Swift) and Q 93 (Mark Anderson, Partner and Head of Corporate Intelligence, PwC)

271 Written evidence from Deloitte (BRI0033)

272 See Chapter 7 for more details of that case.

Bribery Bill, make this clear, as does the subsequent Guidance issued by the Ministry of Justice, which states:

> "… the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities."[273]

210. We therefore have to decide whether, notwithstanding what was intended, there is a danger that "adequate" in the Bribery Act will be interpreted too strictly, so that a company which had in place anti-bribery procedures which were reasonable in all the circumstances but did not in fact prevent bribery taking place might be unable to avail itself of this defence. We think such an interpretation is very unlikely, and that it is equally unlikely that a judge, in directing a jury which has to decide on a balance of probabilities whether the procedures which a company had in place were "adequate", would give them such a strict direction; any judge would surely instruct the jury to take the surrounding circumstances into account. We are accordingly not minded to recommend amendment of the Act, but we believe that the Guidance, which of course pre-dates the 2017 Act and the HMRC Guidance, should be amended.

211. **We believe that it is unnecessary to amend the wording of section 7 of the Act, but that the statutory Guidance should be amended to draw attention to the different wording in the Criminal Finances Act 2017 and in the HMRC Guidance to that Act, and to make clear that "adequate" does not mean, and is not intended to mean, anything more stringent than "reasonable in all the circumstances".**

An opinion on proposed conduct?

212. In the United States there is a procedure under which companies may formally request from the Department of Justice (DoJ) an opinion about "whether certain specified, prospective—not hypothetical—conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the [Foreign Corrupt Practices Act]". The procedure has never been much used. There were 61 Opinion Procedure Releases between 1980 and 2014, with only four in 2004, the busiest year.[274] There have been none since 2014.

213. The question nevertheless arises as to whether it would be appropriate to have a similar procedure in the UK. Should UK companies be allowed to ask, for example, the SFO for an opinion as to whether the practices and procedures they propose to adopt are "adequate" for the purposes of a section 7 defence? One person who thought so was Monty Raphael QC. He argued in written evidence that the DoJ's opinion procedure was "a valuable mechanism for companies and individuals to determine whether proposed conduct would be prosecuted by the DOJ under the FCPA", and that "while it may be true that large corporations have ready and timely access to reliable advice and can afford to pay for it, many SMEs would doubtless value the creation of a state resource by which they could, if need be and for a modest fixed fee,

273 Ministry of Justice, *The Bribery Act 2010 Guidance*, para 33

274 The FCPA Blog, Richard L. Cassin, 'Are DOJ opinion procedure releases headed for extinction?' (28 December 2015): http://www.fcpablog.com/blog/2015/12/28/are-doj-opinion-procedure-releases-headed-for-extinction.html [accessed 5 February 2019]

receive an opinion they could rely on".[275] The law firm Greenberg Traurig was one of the few other witnesses to suggest that the UK should adopt an approach similar to the US Opinion Procedure Release programme.

214. Since the SFO, rather than the Ministry of Justice, would presumably have to bear the burden of preparing such advisory opinions, their view was of particular importance. Richard Alderman, who was Director from 2008 to 2012, set up such a procedure in July 2009, but before it could get off the ground his successor, Sir David Green QC dismantled it.[276] His robust view was relayed to us by Monty Raphael QC:

> "I don't think the sign downstairs says 'free advice given on serious fraud and corruption'. They can bloody well go and get their own advice from their very expensive ritzy experts … I am not here to give advice. I am here in the same way that the Revenue is, to enforce the law. I don't think the public would be very impressed by cosy deals."[277]

215. Sir David Green himself retired in 2018. We asked the current Director, Lisa Osofsky, for her views. Despite having been in office only five weeks, she had no hesitation in giving them:

> "Do I want to get into the business of that here? I do not. I have enough work to do. Boy, it would blow my budget if I were asked to give assurance all across the piste … I do not think I have the mandate from Her Majesty's Government or the requisite skill set or funding to offer precursor-type advice. My job is to ferret out wrongdoing, to investigate robustly and then to determine whether charges are appropriate."[278]

And she added: "Frankly, DoJ is moving away from some of that. It used to have a compliance officer … to give compliance-related advice. DoJ has not filled that slot since she left three years ago."

216. It is clear that the Government does not intend to give Ms Osofsky the mandate she does not want. Mr Argar said:

> "We are not convinced that the US opinion procedure release programme would be right for this country. My understanding is that even in the US there is movement away from it—I believe there have been no releases since 2014. We do not think it is the right approach, because we do not think that it mirrors, or meshes well with, how our criminal justice system, decisions on prosecution and court system work."[279]

We agree with these views.

217. **In this field, as in any other, it is for companies and their advisers to determine whether activities they propose to undertake or procedures they propose to adopt will comply with the law. Government departments and agencies can and do issue general guidance, but it is not their task to give advice in individual cases. The Serious Fraud Office should not revive the practice they once adopted of offering such advice.**

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275 Written evidence from Monty Raphael QC (BRI0016), paras 18–19

276 SFO, *Approach of the Serious Fraud Office to Dealing with Overseas Corruption* (2009), pp 6–8: https://www.millerchevalier.com/sites/default/files/resources/uk_sfo_guidance.pdf [accessed 17 January 2019]

277 Written evidence from Monty Raphael QC (BRI0016), para 19

278 Q 159 (Lisa Osofsky)

279 Q 194 (Edward Argar MP)

R v Skansen Interiors Ltd

218. The first prosecution under section 7 was of Sweett Group plc. The company pleaded guilty in December 2015 and on 19 February 2016 was ordered by HH Judge Beddoe at Southwark Crown Court to pay a fine of £1.4 million together with confiscation and costs, a total of £2.25 million.[280]

219. The first contested section 7 case was brought to trial in 2018, when Skansen Interiors Ltd (SIL), a small furniture business with around 30 employees which was part of the larger Skansen Group, reported bribery by two of its employees, and was itself charged with the section 7 offence. Because this was the first contested section 7 prosecution, and also because of the implications for deferred prosecution agreements which we discuss in the following chapter, many of our witnesses referred to the case in written evidence and also in oral evidence. We also took evidence from Iskander Fernandez, who at the time of the prosecution was an associate at Cameron McKenna, the solicitors who acted for SIL, and a member of SIL's defence team.

220. Some of the facts are still the subject of controversy,[281] but those we summarise in Box 4 are uncontested.[282]

Box 4: The facts of the Skansen case

SIL was, until it ceased trading in 2014, a small refurbishment company operating mainly in London. In 2013, it won two tenders for office refurbishment from a company called DTZ, worth £6 million in total. In January 2014, the Skansen Group appointed Ian Pigden-Bennett as its new CEO. SIL's Managing Director, Stephen Banks, informed the new CEO that following the award of the DTZ contracts to SIL, £10,000 had been paid to Graham Deakin, a project manager at DTZ. Mr Banks also said that a further £29,000 was due to Mr Deakin on completion of the contracts.

Mr Pigden-Bennett was concerned that these payments were designed to give Skansen an improper advantage over its rivals in the DTZ tender. He therefore initiated an internal investigation and established an anti-bribery and corruption policy, having identified that none appeared to be in place. When Mr Banks attempted to make the £29,000 payment to Mr Deakin, it was blocked, and at the conclusion of the internal investigation, both Mr Banks and Skansen's Commercial Director were dismissed.

Skansen then submitted a suspicious activity report to the National Crime Agency and reported the matter to the City of London Police. The company gave extensive assistance to the police during their investigation, including handing over legally privileged material. At the conclusion of the investigation, Mr Banks and Mr Deakin were charged with and pleaded guilty to offences under sections 1 and 2 of the Act. Mr Banks was sentenced to 12 months' imprisonment and was disqualified as a director for 6 years, and Mr Deakin was sentenced to 20 months' imprisonment and was disqualified as a director for 7 years.

221. SIL itself was charged under section 7. It declined to plead guilty on the grounds that it had in place adequate procedures to prevent bribery. Although

280 SFO, News Releases, 'Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction' (19 February 2016): https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/ [accessed 19 February 2019]

281 See paras 223–25 and 278–80.

282 A more detailed account can be found at Q 203 (Iskander Fernandez).

its controls were limited, it argued that they were proportionate for a small company operating only in the United Kingdom. There were also clauses in the DTZ contracts prohibiting bribery and providing a termination right in the event that bribery occurred. The jury did not accept SIL's defence and returned a guilty verdict. Given that the company had no assets by this time, the only decision available was an absolute discharge.

222. It may be significant that the prosecution was brought by the CPS rather than the SFO. Criticism of the prosecution of SIL centred on the fact that Skansen had self-reported, and had given extensive assistance to the police. Cameron McKenna commented:

> "In response to queries raised (including by the Judge in an earlier abuse of process hearing), the prosecution justified its use of public resources to charge and prosecute a dormant company with no assets on the basis that a successful conviction would 'send a message' to others in the industry about the importance of having adequate procedures in place. No other public interest justification was provided for pursuing the prosecution."[283]

In oral evidence Iskander Fernandez told us that this message could have been sent to the construction industry by the prosecution of the two individuals.[284]

223. In their written evidence the City of London Police told us:

> "In the recent case of R v Skansen Interiors, a new company director discovered bribes paid by one of his sales team to obtain a contract to renovate offices. Prior to reporting this offence to the police, the company transferred all assets to the parent company and dissolved the company, sacking those responsible for the bribery. This meant that when considering corporate bribery offences the company no longer existed and would face no penalties."[285]

224. But in subsequent oral evidence Commander Karen Baxter, the National Coordinator for Economic Crime of the City of London Police, said: "This comment might, on reflection, not be entirely accurate. When this was written there was quite a high-profile case in court [Skansen] that was subject to significant media attention. Therefore, what was written was more a response to the perception of the discussion ongoing at the time."[286]

225. At our final evidence session Iskander Fernandez told us that the re-structuring which involved moving assets away from the subsidiary (SIL) took place in 2010–11, before the offences were committed: "The reason for moving assets away from the subsidiary company was not because of the prosecutions or suspicions that it would be prosecuted".[287] And later still Ian Pigden-Bennett, the CEO of the Skansen Group, wrote to tell us that the City of London Police were "totally incorrect" with their suggestion that the

283 CMS Law-Now, 'The jury is out on compliance in the first test of the Bribery Act's adequate procedures defence', (1 March 2018): http://www.cms-lawnow.com/ealerts/2018/03/the-jury-is-out-on-compliance-in-the-first-test-of-the-bribery-acts-adequate-procedures-defence [accessed 4 March 2019]

284 Q 203 (Iskander Fernandez)

285 Written evidence from City of London Police (BRI0022)

286 Q 110 (Commander Karen Baxter)

287 Q 203 (Iskander Fernandez)

company was dissolved to avoid penalties, and set out in detail the facts as he saw them.[288]

226. Skansen was a far from typical case. The suspicion lingers that SIL was perhaps not fairly treated by the CPS either in relation to the prosecution or in relation to the refusal of a DPA.[289] If it was indeed the intention of the CPS to draw attention to the need for even small companies to have in place adequate anti-bribery procedures, in that they certainly succeeded. But otherwise we agree with John Bray, the Director of Control Risks, who said: "I would not draw many conclusions at all from the Skansen case. For me, the main lessons are that you need to have something rather than nothing. You need to record what you are doing. For me, that case is an outlier."[290]

Failure to prevent as a model for future legislation

227. The extension of the "failure to prevent" offence from bribery to facilitation of tax evasion has been generally welcomed, and some witnesses have suggested that this would be a good way of improving the conduct of companies in relation to economic crime generally. Hannah von Dadelszen, the Head of Fraud at the SFO, told us that:

> "the SFO has long lobbied for a development in the area of corporate criminal liability. Our position has been that we have a very sensible failure-to-prevent offence for bribery under section 7. That regime has been adopted in a tax arena in that the facilitation of tax evasion carries with it a failure-to-prevent offence both domestically and overseas. What is the impediment? Why should we not also have that for broader economic crime? For me, as head of an operational division dealing with these issues, that would certainly be a very effective tool … I think we need the failure-to-prevent model that currently exists in section 7 to apply more broadly to wider economic crime, such as Fraud Act offences, money laundering offences and FiSMA offences."[291]

228. Donald Toon of the National Crime Agency, was rather more cautious:

> "Yes, we support it, but we think that it has to be done very carefully. There is a need for real care around how any broader offence is structured and focused, and the level of preparation that would be required for its introduction—that is, the level of attention that would have to be paid to understanding what mitigations are needed in corporate structures against the risk of becoming involved in wider economic crime."[292]

229. As early as May 2016, before the Criminal Finances Act was passed, David Cameron, then Prime Minister, called for consultation on a new offence of failure to prevent economic crime, and in January 2017 the Ministry of Justice issued a consultation paper on the wider issue of reform of the law on corporate liability for economic crime. The consultation closed at the end of March 2017. Two years later, the responses to the consultation have still not been published by the Government, which has not given its views. However on 18 March 2018 Robert Buckland QC MP, the Solicitor General, said in an interview that there was a strong case for a new corporate offence of

288 Written evidence from Ian Pigden-Bennett (BRI0053), 10 December 2018
289 See paras 277–80.
290 Q 92 (John Bray)
291 Q 117 (Hannah von Dadelszen)
292 Q 190 (Donald Toon)

failure to prevent economic crime.[293] On 4 December 2018, when Ministers gave evidence to us, Mr Argar said: "We intend to publish our response to it [the consultation] next year," and Ben Wallace MP added: "The Solicitor-General and I are pretty keen that we explore further the failure to prevent in broader economic crime … We raised it at the last inter-ministerial government meeting on it. John Penrose[294] and I are keen to see this."[295]

230. The responses to the Government consultation, though unpublished by the Government, are widely available on the websites of the respondents. None that we have seen opposes the extension of the "failure to prevent" offence; many support it, as have our witnesses who have addressed the issue.

231. **We hope the Government will delay no more in analysing the evidence it received two years ago and in reaching a conclusion on whether to extend the "failure to prevent" offence to other economic crimes.**

232. **If Government action includes further legislation, a decision will have to be reached on the wording of any due diligence defence. On the assumption, which we believe to be correct, that there is no intended or actual difference in meaning between "adequate" procedures and procedures which are "reasonable in all the circumstances", we believe the latter more clearly gives the intended meaning.**

293 Joe Watts, 'Minister says time has come for new corporate offence of "failing to prevent economic crime"', *The Independent* (18 March 2018): https://www.independent.co.uk/news/uk/politics/failing-to-prevent-economic-crime-robert-buckland-solicitor-general-consultation-a8262396.html [accessed 21 January 2019]

294 John Penrose MP, the Government's Anti-Corruption Champion.

295 Q 201 (Ben Wallace MP)

CHAPTER 7: DEFERRED PROSECUTION AGREEMENTS

The Crime and Courts Act 2013

233. Until the enactment of the Crime and Courts Act 2013 the Deferred Prosecution Agreement (DPA) was a creature unknown to English law, though familiar for some time in the United States and other countries, some of which (including the United States) also have Non-Prosecution Agreements (NPAs). In essence, a DPA is most commonly used in the area of economic crime, and is a bargain under which the prosecutor undertakes not to proceed with the prosecution of a corporation for a fixed time in return for the defendant mending its ways and paying a financial penalty for the privilege.

234. The relevant provisions of the Crime and Courts Bill were first considered by the House of Lords on 30 October 2012; the Report stage for these provisions was on 12 December 2012.[296] Fortuitously, the previous day it had been announced that HSBC had concluded a 5-year DPA with the US federal prosecutors relating to its failure to prevent the money laundering of "at least $881 million in drug trafficking proceeds."[297] The many conditions of the DPA included the payment of $1.9 billion,[298] and the agreement included the statement that "If this matter were to proceed to trial, the Department [of Justice] would prove beyond reasonable doubt, by admissible evidence, the facts alleged below …".[299] But without that agreement, conviction of HSBC might have resulted in its having to cease banking operations in the United States.[300]

235. The House therefore had before it a striking example of the benefits which a DPA could confer on both the prosecutors and the bank, and it is perhaps not surprising that the relevant provisions of the Bill were passed without amendment in both Houses, and enacted as section 45 of and Schedule 17 to the Crime and Courts Act 2013. The Act received Royal Assent in April 2013, but delay in issuing the Code of Practice for Prosecutors resulted in Schedule 17 not coming into force until 24 February 2014.[301]

296 The Bill followed an unusual procedure. It was introduced in the House of Lords on 10 May 2012 and completed its Committee stage in July 2012. But the Government wished to include in it further major provisions, including the Schedule on DPAs, and on 30 October 2012 there was an extra day in Committee when the new provisions were introduced. This was treated as the Second Reading of those provisions, and the second extra day on 13 November 2012 was in effect the Committee stage for those provisions. The Report stage for those provisions was on 12 December 2012.

297 Statement of Facts by the United States Department of Justice, 11 December 2012, para 9: https://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-attachment-a.pdf [accessed 4 March 2019]

298 Then approximately £1.2 billion.

299 Statement of Facts by the United States Department of Justice, 11 December 2012, para 2. HSBC kept to all the requirements of the agreement, which expired on 11 December 2017.

300 "The OCC [Office of the Comptroller of the Currency] indicated that a guilty plea (or conviction) would require a determination by the Comptroller on whether to hold a hearing to consider revoking the bank's US charter." US Treasury documents quoted in the Congressional Committee Report "Too Big to Jail". 'Too Big to Jail Congressional Report', *The New York Times* (15 July 2016), para 15: https://www.nytimes.com/interactive/2016/07/15/business/document-Too-Big-to-Jail-Congressional-Report.html [accessed 21 January 2019]

301 Crime and Courts Act 2013 (Commencement No. 8) Order 2014, (SI 2014/258)

236. DPAs apply to many economic crimes other than bribery.[302] The provisions relating to DPAs extend only to England and Wales,[303] and the procedure cannot therefore be used where the conduct which constitutes the offence is confined to Scotland or Northern Ireland. We comment on the implications for Scotland in Chapter 9.

Development of DPAs

237. In written evidence Lord Garnier QC explained to us how the English DPA had developed.[304] When, as an MP, he was shadow Attorney General from 2009–10, and then Solicitor General from 2010–12, he sought a more effective way of dealing with corporate crime, particularly economic and financial crime, and consulted widely on how the US-style DPA might be adapted to this jurisdiction. The result is that there are significant differences between DPAs in the two jurisdictions, in particular:

- American DPAs emerged through practice and are not, as here, underpinned by statute;
- English DPAs must be approved by the court whereas in the USA the judiciary has very little, if any, say in their formulation or conclusion;
- In England DPAs are not available to individual defendants;
- In the USA there are civil settlements, Non-Prosecution Agreements (NPAs) and DPAs whereas in England we do not have NPAs.

238. Lord Garnier wrote:

> "There are roughly 50–60 DPAs and NPAs every year in the United States and whereas at the outset they were primarily concerned with banking offences, money laundering, overseas corruption under the Foreign Corrupt Practices Act and other financial crimes committed by corporates in New York and other large financial or economic centres on the east coast of the United States, their remit has been extended, for example, into price fixing in the pharmaceutical industry and health and safety cases and to corporates in other parts of the United States. I had intended that in this jurisdiction, scaling things down to our smaller economy, we would see about 8 to 10 DPAs each year but even though the number of DPAs approved so far is very low I am hopeful we will see the pace increase as we become more used to this novel way of doing justice."[305]

DPA procedure

239. In the case of DPAs only the Director of Public Prosecutions (DPP) and the Director of the SFO (DSFO) are "designated prosecutors" who can authorise a DPA, and they must "exercise personally the power to enter into a DPA".[306]

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302 The offences are listed in Part 2 of Schedule 17. They include the common law offences of conspiracy to defraud and cheating the public revenue, and offences under named provisions of a large number of statutes. In addition to the Bribery Act 2010 these include the Theft Act 1968, the Forgery and Counterfeiting Act 1981, the Financial Services and Markets Act 2000, the Proceeds of Crime Act 2002, and the Fraud Act 2006. Other statutes subsequently added include the Criminal Finances Act 2017.

303 Crime and Courts Act 2013, section 61(13)(g)

304 Written evidence from Lord Garnier QC (BRI0038)

305 Written evidence from Lord Garnier QC (BRI0038)

306 Crime and Courts Act 2013, Schedule 17, paragraph 3.

In Chapter 3 we have criticised the statutory requirement that only the DPP and DSFO can authorise the prosecution of offences under the Bribery Act. In the case of DPAs we believe this requirement is appropriate. It will not put an excessive burden on the Directors, and the policy implications will often need consideration at the highest level.

240. As stated in the DPA Code of Practice, a DPA is a discretionary tool and the decision on whether or not to enter into one must be based on an assessment of the evidence and the public interest and must, in addition to the DPA Code of Practice, have regard to other codes of practice and guidance such as the Code for Crown Prosecutors, the Joint Prosecution Guidance on Corporate Prosecutions and, for bribery offences, the Bribery Act Joint Prosecution Guidance.[307] It is only if, after this assessment, the relevant prosecutor determines that a DPA is an appropriate way to proceed that they can invite the company to enter into negotiations.

241. As we have said, in the United States the judiciary plays little if any part in the agreement of a DPA. The role played by the courts in England is "critical", in the words of Sir Brian Leveson who, as President of the Queen's Bench Division, has given the approval of the Crown Court to all four of the DPAs which have so far been agreed.[308] Following the conclusion of negotiations but before the terms of the DPA are agreed, the prosecutor must apply to the court at a "preliminary" hearing held in private for a declaration that entering into a DPA is "likely" to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate. The court must give reasons for its decision and, if a declaration is declined, a further application is permitted.[309] In that way, the court retains control of the ultimate outcome and, if the agreement is not approved, the possibility of prosecution is not jeopardised as a consequence of any publicity that would follow if these proceedings had not been held in private.

242. If the first declaration has been granted and the DPA is finalised on the terms previously identified, the prosecutor must apply to the Crown Court at a "final" hearing for a second declaration that the DPA is not just "likely" to be, but is in fact, in the interests of justice, and that the terms of the DPA are indeed fair, reasonable and proportionate. Again the court must give reasons for its decision. The hearing may be held in private, but if the court decides to approve the DPA it must give its reasons in open court. The prosecutor must then publish the DPA, the declaration of the court and the court's reasons, unless the court orders postponement of publication to avoid prejudicing proceedings.[310] The entire process thus becomes open to public scrutiny, consistent with the principles of open justice.

243. The Act gives the judge no discretion to combine the two hearings and to give a single judgment. There must be some doubt as to whether it is always necessary within a short space of time to hold one hearing in private for the judge to decide whether the proposed DPA is "likely" to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate, and then a short time later to hold a further hearing at which the judge can declare that the DPA "is" in the interests of justice and that its terms are

307 SFO, *Deferred Prosecution Agreements Code of Practice*, February 2014, paras 2.2–2.3: https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf [accessed 4 March 2019]

308 Q 154 (Sir Brian Leveson)

309 Crime and Courts Act 2013, Schedule 17, paragraph 7

310 Crime and Courts Act 2013, Schedule 17, paragraph 8

fair, reasonable and proportionate. As Sir Brian Leveson told us, he would be unlikely to change his mind unless there was a change of circumstances. He added: "I have now come to the view that there is no reason why one judgment is not sufficient."[311]

244. In the Rolls-Royce case the circumstances were such that Sir Brian delivered only one judgment. The preliminary hearing was concluded late on 16 January 2017 and the final hearing was held, and concluded, the following day. This was "linked to the change in administration in the United States." Two months later, in the Tesco case, Sir Brian held the preliminary hearing on 27 March 2017, granted the declaration sought, but reserved judgment. When on 10 April 2017 he held the final hearing, his judgment gave his reasons for granting both the preliminary and the final declarations.

245. After the reporting restrictions in the Tesco case were lifted, Sir Brian sent us supplementary written evidence reiterating what he had said in his oral evidence and adding:

> "In practice the procedure envisaged in the Act is somewhat rigid; it is, of course, a matter for Parliament but, as a matter of practice, my experience suggests that it would help if the court was given greater discretion as to the management of the hearings. I understand the need for separate hearings under paragraphs 7 and 8: only if provisional approval is expressed will the parties be prepared to enter into a DPA which is, after all, a binding agreement with enforceable terms: the precise approach to the resolution of the two stage process, however, could be a matter left to the court."[312]

246. We agree, and we believe that the Act should be amended to give the judge a discretion to manage the hearings in whatever way seems most appropriate to the individual case. What is essential is that a declaration approving a DPA, with the reasons for it, must be made in open court.

247. **Schedule 17 to the Crime and Courts Act 2013 should be amended to give the court greater discretion to manage the preliminary and final hearings in whatever way seems most appropriate. However a declaration approving a DPA and giving the reasons for it must be made in open court.**

248. While the DPA procedure can be lengthy, complex and expensive, preparing for and defending a prosecution is likely be more so in every way, and not least in consumption of management time. The prosecutor's costs of the DPA will have to be paid, but they will be less than if the case goes to trial. And while the company will have to disgorge the proceeds of its unlawful enrichment, its financial penalties may be only a fraction of the fine which would follow a conviction. Perhaps most importantly, many countries have laws which debar a convicted company from public procurement contracts, and still more countries have laws allowing discretionary debarment. In the Rolls-Royce case[313] the judge was informed that 15% of the order book fell into the first category and a further 15% into the second.[314]

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311 Q 150 (Sir Brian Leveson)
312 Supplementary written evidence from Sir Brian Leveson (BRI0066)
313 See paras 256–260 below.
314 Judgment of Sir Brian Leveson P in *Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc*, 17 January 2017, para 53: https://www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf [accessed 21 January 2019]

The four DPAs to date

249. At the date of this report there have been four DPAs. Two have involved companies which are household names: Rolls-Royce and Tesco. Standard Bank (now ICBC Standard Bank plc) is a financial markets and commodities bank. The fourth is a small company known only as XYZ because it is still subject to reporting restrictions. All except Tesco have involved offences under the Bribery Act; Tesco is a false accounting case.

Standard Bank plc

250. Standard Bank was the first to have a DPA agreed, on 30 November 2015. It set the pattern for subsequent cases, and we therefore explain the circumstances in some detail. The Government of Tanzania wished to raise funds, and a subsidiary of Standard Bank sought instructions to raise the funds, but negotiations did not progress until the subsidiary agreed to pay 1% of the funds raised to a company, EGMA, two of whose directors were the Commissioner of the Tanzanian Revenue Authority and the former CEO of the Tanzanian Capital Markets and Securities Authority. EGMA provided no services in return for its fee of US $6m, and that fee was shortly withdrawn in cash. Standard Bank was alerted, the matter was investigated, and within three weeks the SFO were informed. Standard Bank was charged with a failure to prevent associated persons from committing bribery, contrary to section 7(1) of the Act. There was no suggestion that Standard Bank itself, or any of its employees, knew of or participated in the offence, but Standard Bank could not rely on the "adequate procedures" defence because it did not supply sufficient guidance or training to prevent associated persons from engaging in such conduct.[315]

251. The requirements which the DPA imposed on Standard Bank, which the court judged to be in the interests of justice and "fair, reasonable and proportionate",[316] were as follows:

(i) Payment of compensation of US $6 million plus interest;

(ii) Disgorgement of profit on the transaction of US $8.4 million;

(iii) Payment of a financial penalty of US $16.8 million;

(iv) Past and future co-operation with the relevant authorities in all matters relating to the conduct arising out of the circumstances of the draft Indictment;

(v) Commissioning and submitting to an independent review of its existing internal anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws; and

(vi) Payment of the costs incurred by the SFO.

252. The DPA lasted for three years. On 30 November 2018 Lisa Osofsky, the Director of the SFO, issued a statement welcoming the successful conclusion

315 Facts taken from the final judgment of Sir Brian Leveson P in *Serious Fraud Office v Standard Bank plc*, 30 November 2015, paras 6–8: https://www.judiciary.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf [accessed 21 January 2019]

316 Final judgment of Sir Brian Leveson P in *Serious Fraud Office v Standard Bank plc*, 30 November 2015, para 13

of the UK's first DPA, and explaining that all the terms imposed by the DPA on Standard Bank had been complied with.

253. The judge acknowledged that "the most difficult assessment was as to the appropriate financial penalty";[317] we discuss this in paragraphs 284 to 310 below.

XYZ Ltd

254. XYZ Ltd was an SME with 25 employees which generated the majority of its revenue from exports to the Asian market. In 2000 it was acquired by a US corporation, ABC. Between June 2004 and June 2012 XYZ was involved, through a small but important group of its employees and agents, in the systematic offer and/or payment of bribes to secure contracts in foreign jurisdictions. There was evidence that 28 contracts were procured as a result of the bribes, and that these contracts earned XYZ £17.24m. Prior to 2012, on its own admission XYZ did not have any adequate compliance provisions in place. In late 2011 ABC sought to extend its global compliance programme within XYZ, and in August 2012 concerns were raised about the way in which contracts had been secured. The law firm which investigated self-reported the matter to the SFO on behalf of XYZ, and continued to supply information from its investigation to the SFO.[318]

255. The judge was at pains to emphasise that although ABC had received about £6m in dividends from XYZ over this period, it had been wholly unaware of these corrupt activities and there was no reason that it should have been aware; there was no suggestion of a parent company knowingly making a profit from its subsidiary's criminality, and "absolutely no suggestion that XYZ was deliberately operated as an impecunious vehicle through which corrupt payments might be made."[319] However the fact that XYZ was "impecunious" was an important factor in the calculation of the appropriate penalty.[320]

Rolls-Royce

256. This was the third and by far the largest application for approval by the court of a DPA reached between the SFO and two entities now ultimately owned by Rolls-Royce Holdings plc, namely Rolls-Royce plc and its Delaware incorporated subsidiary, Rolls-Royce Energy Systems Inc ("RRESI"). It covered the conduct of Rolls-Royce and RRESI in Nigeria, Indonesia and Russia along with the conduct of Rolls-Royce alone in Thailand, India, China and Malaysia. It involved agreements to make corrupt payments in many jurisdictions going back over many years, and failure to prevent bribery by employees or intermediaries in Nigeria, Indonesia, China and Malaysia between the commencement of the Bribery Act and the end of 2013.

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317 *Ibid.*, para 16

318 Facts taken from the final judgment of Sir Brian Leveson P in *Serious Fraud Office v XYZ Limited*, 8 July 2016, paras 1–7. The published version of the judgment (including the names of the companies) was redacted because there were, and still are, ongoing criminal proceedings. In paras 16–17 of his preliminary judgment in that case Sir Brian explained that 24 of the 28 implicated contracts pre-dated the coming into force of the Bribery Act, and four post-dated it. The draft indictment therefore included counts of conspiracy to corrupt, contrary to section 1 of the Prevention of Corruption Act 1906, as well as conspiracy to bribe, contrary to section 1 of the Bribery Act 2010, and failure to prevent bribery, contrary to section 7 of the Bribery Act 2010. SFO, News releases, *SFO secures second DPA* (July 2016): https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/ [accessed 21 January 2019]

319 *Ibid.*, final judgment, para 17

320 See para 292 below.

257. Rolls-Royce and its subsidiaries employ some 50,000 people, in more than 50 countries. The case concerned the conduct of its civil aerospace business, which manufactured engines for commercial large aircraft and corporate jet markets and generated approximately 50% of its revenue, and the conduct of its defence aerospace business, which manufactured engines for the military transport market and was the second largest provider of defence aero engine products and services in the world (generating approximately 20% of its revenue). The judge, again Sir Brian Leveson, said:

> "It can properly be described as devastating and of the very greatest gravity that the conduct of this institution should fall to be examined within the context of a criminal investigation and that the investigation … should reveal the most serious breaches of the criminal law in the areas of bribery and corruption (some of which implicated senior management and, on the face of it, controlling minds of the company)."[321]

258. The important factor distinguishing the Rolls-Royce DPA from the others is that it is the only one which did not begin with the company self-reporting. The initiative did not come from Rolls-Royce contacting the SFO, but from the SFO seeking information from Rolls-Royce about online reports which had come to the SFO's attention early in 2012. Rolls-Royce then began an investigation which at the date of the judgment was still ongoing; it supplied regular reports to the SFO, supplied information to the SFO for the SFO's own investigation, waived legal professional privilege, and acted throughout with what Lord Garnier (then Sir Edward Garnier) QC, Counsel for the SFO, described as "extraordinary co-operation".[322]

259. Hannah von Dadelszen, the Head of Fraud at the SFO, bore this out:

> "I think that the company handed over to our office in excess of 250 witness interviews that it had conducted, as well as 40 million documents,[323] and it met with us regularly. Our requests were onerous and highly annoying, and it met them. You do not see that sort of conduct every day. It did not self-report initially, but since then it has disclosed a lot of material that we would not have uncovered in a perhaps more adversarial forum, and those factors led us to the DPA outcome."[324]

260. The importance of self-reporting generally, and the implications of the failure of Rolls-Royce to self-report, are questions we consider in paragraphs 271–275 below. We deal with the decision not to prosecute any individuals in paragraphs 318–319 below.

Tesco

261. The Tesco case is the only DPA to date not involving a bribery charge. It arose from the acceptance by Tesco Stores Ltd of responsibility for false accounting practices. The DPA was approved by Sir Brian Leveson on 10 April 2017, but the texts of the DPA and of the judgment approving it were

321 *Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc.*, judgment of 17 January 2017, para 4: https://www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf [accessed 21 January 2019]

322 *Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc.*, judgment of 17 January 2017: https://www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf [accessed 4 February 2019]

323 The figure given by Lisa Osofsky, the Director of the SFO, was 30 million, see Q 157 (Lisa Osofsky).

324 Q 117

made subject to reporting restrictions because prosecutions had been brought against three individuals for fraud by abuse of position and false accounting. The three stood trial in September 2017 but following one of the defendants falling ill the jury was discharged on 6 February 2018. The retrial of two of the defendants began on 1 October 2018, and on 26 November the judge ruled that there was no case to answer, a ruling upheld by the Court of Appeal on 5 December 2018. On 23 January 2019 the SFO announced that they did not intend to proceed against the third individual, the reporting restrictions were lifted, and the DPA and the judgment of Sir Brian Leveson were published.[325]

Our scrutiny of DPAs

262. As we have stressed, DPAs apply to many economic crimes of which bribery is only one. However, of the four DPAs so far concluded, three relate to offences under the Bribery Act, and it is plain that DPAs are having and will continue to have a major influence on the handling of cases involving corporate bribery. This is why the Liaison Committee expressly mandated us to include them in our scrutiny of the Bribery Act.

263. There is another reason. Lord McNally, then Minister of State at the Ministry of Justice, stated during the passage of the Crime and Courts Bill: "It is important that there is a common understanding of how this new procedure will operate. Once implemented, the Government will keep this area of the law under review and formal post-legislative scrutiny will also take place in April 2018."[326] To the best of our knowledge, no such formal post-legislative scrutiny has taken place or is planned. The Government's Memorandum to this Committee in June 2018 included a passage on DPAs,[327] but no assessment of how they are operating. We hope that our assessment of how they are operating in the field of bribery may be of assistance.

264. We have considered in particular the following matters:

- The DPA Code of Practice
- The importance of judicial oversight
- The role of self-reporting
- Consistency between large and small companies
- Financial penalties
- Prosecution of individuals
- Whether this country should also consider non-prosecution agreements.

The DPA Code of Practice

265. Paragraph 6(1) of Schedule 17 to the Crime and Courts Act 2013 provides:

> "The Director of Public Prosecutions and the Director of the Serious Fraud Office must jointly issue a Code for prosecutors giving guidance on—

325 *Serious Fraud Office v Tesco Stores Ltd*, judgment of 10 April 2017: https://www.judiciary.uk/wp-content/uploads/2019/01/sfo-v-tesco-stores-ltd-2017-approved-final.pdf [accessed 25 February 2019]

326 HL Deb, 30 October 2012, cols 570–571 (Lords Chamber on re-commitment)

327 Ministry of Justice, *Bribery Act 2010: Post Legislative Scrutiny Memorandum*, Cm 9631, June 2018, paras 114–123: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf [accessed 4 March 2019]

> (a) the general principles to be applied in determining whether a DPA is likely to be appropriate in a given case, and
>
> (b) the disclosure of information by a prosecutor to P in the course of negotiations for a DPA and after a DPA has been agreed."

Paragraph 6(2) lists other matters on which the Code of Practice may give guidance; they include the use of information obtained by a prosecutor in the course of negotiations for a DPA.

266. The DPA Code of Practice came into effect on 24 February 2014.[328] It sets out the factors of which the prosecutor should be satisfied before initiating DPA negotiations; the factors the prosecutor should take into account when deciding to enter into a DPA; the process for inviting a company to enter into DPA negotiations; the conduct of the negotiations; and the terms which should be included in the agreement, including the financial terms. Baker McKenzie suggested that "it would be helpful if the SFO could provide more guidance on what is expected from organisations. General statements such as "*not doing anything that could prejudice any investigation that the prosecuting authority may wish to carry out*" are well understood. However, often there can be real uncertainty as to: (i) whether taking a particular step could prejudice an investigation; and (ii) if so, whether the perceived benefits of the step outweigh any possible prejudice to an investigation, such as conducting witness interviews with witnesses or suspects (particularly where they are external to the company)."[329]

267. The Code is written in general terms, but we believe this is inevitable given that no two cases will be alike. The fact that DPA negotiations are taking place at all pre-supposes close co-operation between the prosecutor and the company, and we think this is the forum for such uncertainty to be resolved in any particular case.

The importance of judicial oversight

268. Asked what importance he attached to the fact that DPAs could not be agreed without judicial approval, Sir Brian Leveson replied:

> "I think it is absolutely critical, because we do not do plea bargains in this country, as others do. This has to be conducted in public, so that, in other words, everybody can see what is being done in their name. Therefore, there is no private deal between a prosecutor and a company that nobody ever hears anything about … The disinfectant of transparency in this area is absolutely critical."[330]

269. We entirely agree.[331] It is inevitable that the investigation, the negotiations, and the first stage at which the court is asked to rule on whether what is proposed is likely to be in the interests of justice, must all take place in

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328 SFO, *Deferred Prosecution Agreements Code of Practice*, February 2014: https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf [accessed 4 March 2019]

329 Written evidence from Baker McKenzie LLP (BRI0030)

330 Q 154 (Sir Brian Leveson)

331 The Australian Crimes Legislation Amendment (Combatting Corporate Crime) Bill sets up a DPA regime which closely follows the system in the Crime and Courts Act 2013. However approval of the DPA is not a matter for the courts, but for an "approving officer" who is appointed by the minister and is a "former judicial officer" with "the knowledge or experience necessary to properly exercise the powers of an approving officer" (Schedule 2, new section 17G inserted in the Director of Public Prosecutions Act 1983).

private. This makes it all the more important that the final stage should be given the maximum publicity, as is required by the statute.[332] If at any of the earlier stages it appears that agreement cannot or should not be reached, the prosecutor will have to decide whether to proceed with a prosecution.

270. When Sir Brian said that we do not do plea bargains "in this country", he was referring to England and Wales. Scotland does not have DPAs, and does not have judicial oversight of civil settlements. Sir Brian was understandably unwilling to comment on the Scottish system, but went so far as to say: "I do not resile from the word [critical], with great respect to my Scottish colleagues."[333] We, unlike Sir Brian, believe it is part of our duty to comment on the Scottish system, and do so in Chapter 9.

The role of self-reporting

271. Two significant factors in determining whether a DPA will be offered are whether the company has self-reported the conduct and whether it has co-operated with the criminal investigation.[334] In their written evidence Corruption Watch emphasised the importance of self-reporting.[335] Their Policy Director, Susan Hawley, told us in oral evidence:

> "It [self-reporting] should be a very key factor [in whether to grant a DPA] but, from talking to some of the people in enforcement agencies, you can get a bad selfreport and not much cooperation, or you can get no selfreport and very good cooperation. It is about how you balance that out … But you need to incentivise companies to selfreport, because one of the primary policy objectives was to increase detection and get companies to come forward. As we say in our [written] evidence, that is why you should have, as the DOJ does in the US, differential reductions in fine for where you selfreport and cooperate and where you just cooperate. Otherwise, you get a lot of commentary, as there was after RollsRoyce, saying, "Well, why do we not just hold out until we are caught and then cooperate?" Then you are not increasing the chances of greater detection of economic crime."[336]

272. If there are indeed circumstances where "you can get a bad selfreport and not much cooperation", then a DPA should not be contemplated. Self-reporting should only be a first step in further co-operation between the company and the prosecutor. A company which self-reports has no right to a DPA, or even a right to be invited to negotiate a DPA. The Code of Practice emphasises that "an invitation to negotiate a DPA is a matter for the prosecutor's discretion."[337] If the company's full co-operation is not subsequently forthcoming, the prosecutor should not be considering inviting the company to enter into a DPA. We believe this is clear. The Fraud Advisory Panel told us that "in two

332 Crime and Courts Act 2013, Schedule 17, paragraph 8(7)
333 Q 154 (Sir Brian Leveson)
334 SFO, Deferred *Prosecution Agreements Code of Practice*, February 2014, paras 2.8.2.i and 2.9.1–2.9.3: https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf [accessed 4 March 2019]
335 Written evidence from Corruption Watch (BRI0039)
336 Q 46 (Susan Hawley)
337 SFO, *Deferred Prosecution Agreements Code of Practice*, February 2014, para 2.1: https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf [accessed 4 March 2019]

cases, Sweett[338] and Barclays,[339] DPAs were declined by the SFO due to a lack of apparent co-operation by the companies."[340]

273. However, as Ms Hawley said, "you can get no selfreport and very good cooperation"; Rolls-Royce is the prime example. In his judgment in that case Sir Brian Leveson said:

> "The fact that an investigation was not triggered by a self-report would usually be highly relevant in the balance but the nature and extent of the co-operation provided by Rolls-Royce in this case has persuaded the SFO not only to use the word "extraordinary" to describe it but also to advance the argument that, in the particular circumstances of this case, I should not distinguish between its assistance and that of those who have self-reported from the outset. Given that what has been reported has clearly been far more extensive (and of a different order) than may have been exposed without the co-operation provided, I am prepared to accede to that submission."[341]

274. The question which arises is whether the role of self-reporting should be formalised. Pinsent Masons, an international law firm, told us:

> "There should be a clear written process that, if a company does not self-report, it could (with co-operation and remediation) still potentially qualify for DPA. On the other hand, if a company does self-report, the clear written process should contain a presumption that the company will get a DPA, unless a number of exceptions apply such as the self-report not being full and frank or if the company subsequently offered no co-operation following its initial self-report or disclosure."[342]

Stewarts Law wrote:

> "DPAs are, in our view, being very tightly restricted as to their availability and unnecessarily so. By that we mean that the SFO is failing to offer DPAs as a result of the application of unnecessarily stringent entry requirements. As seen with Rolls Royce, such stringency is capable of relaxation; the requirements should be adjusted with greater frequency."[343]

275. We do not know whether the views of these firms are perhaps coloured by experiences they have had with companies which had not self-reported and were not offered a DPA. It seems to us too simplistic to suggest that there should be a presumption, whether statutory or in the Guidance, that a

338 The SFO opened a criminal investigation into Sweett Group plc in July 2014 in relation to its activities in the United Arab Emirates. The company was charged with an offence under section 7 of the Bribery Act to which it pleaded guilty on 18 December 2015. On 19 February 2016 it was ordered to pay £2.25 million in fine and confiscation.

339 The SFO opened a criminal investigation into Barclays plc and Barclays Bank plc (Barclays) in August 2012. The charges were not however under the Bribery Act but under the Companies Act 1985. The charges against Barclays were dismissed by the Crown Court on 21 May 2018. On 23 July 2018 the SFO applied to the High Court to re-instate the charges, but on 26 October 2018 the High Court ruled against the SFO. Proceedings against the individuals allegedly involved are ongoing, and reporting restrictions are in place.

340 Written evidence of the Fraud Advisory Panel (BRI0020) para 27

341 *Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc.*, judgment of 17 January 2017, para 22: https://www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf [accessed 4 March 2019] And see the evidence of Hannah von Dadelszen, Head of Fraud at the SFO, quoted in para 259 above.

342 Written evidence from Pinsent Masons (BRI0041)

343 Written evidence from Stewarts Law (BRI0043)

company which self-reports should be offered a DPA, and a company which does not, should not. Such a presumption would have too many exceptions. We agree with Ms Hawley that self-reporting is a "key factor", but the degree of co-operation between the company and the prosecuting authority is at least as important. Each case must be judged on its facts.

Consistency between large and small companies

276. We have referred in paragraph 254 above to the fact that the second DPA to be agreed was with a company with 25 employees. Nevertheless there was a perception among some of our witnesses that a DPA was likely to be more readily available to a large company than to a small one. Amanda Pinto QC thought there was "a feeling, whether or not it is borne out evidentially, that [DPAs] are more likely to be used with bigger rather than smaller corporates, despite what is said about XYZ".[344] Susan Hawley, Policy Director at Corruption Watch, told us:

> "There are genuine public confidence issues around DPAs and one of them is that, yes, the big companies can negotiate them. The small companies are much easier to prosecute, including for the substantive offences, which makes the offending more serious. Therefore, the public interest in offering them a DPA is lower, because the offending appears more serious."[345]

277. To some extent this view derives from the fact there was no DPA in the case of Skansen Interiors Ltd (SIL).[346] UK Finance told us that there had been "extensive commentary on the conviction of a micro-enterprise [SIL] that self-reported but was not offered a DPA and failed to uphold its 'adequate procedures' defence at trial".[347] Baker McKenzie wrote that "… concern was expressed over the difference in the approach taken to self-reporting in the *Rolls Royce* and *Skansen Interiors* cases." They suggested that "steps should be taken to ensure that DPAs are seen as available for SMEs as well as large 'too big to fail' corporates. It would be unfair and unjustified if DPAs only came to be associated with larger companies."

278. Certainly those associated with Skansen, from its self-reporting through its negotiations with the City of London Police to the proceedings in court, thought that SIL should have been offered a DPA, and were led to believe that they would be offered one. Ian Pigden Bennett, the former CEO of the Skansen Group, wrote that "Despite verbal CPS agreement via their Barrister in Southwark Crown Court to enter into a Deferred Prosecution Agreement this was reneged on by the CPS as they believed it was in the Public Interest to prosecute the company." [348]

279. This was confirmed by Iskander Fernandez, who at the time was working as an associate at Cameron McKenna in SIL's legal team:

> "I was at court on that day when discussions were had between the defence and the prosecution counsel about a DPA and how that could work. Following a very short conversation with a reviewing lawyer at the CPS, prosecution counsel approached us and said, in the presence

344 Q 166 (Amanda Pinto QC)
345 Q 46 (Susan Hawley)
346 We have set out the details of that case in the previous chapter (paras 218–226).
347 Written evidence from UK Finance (BRI0015)
348 Written evidence from Ian Pigden-Bennett (BRI0053)

> of Mr Pigden-Bennett, that the company would be invited to enter into discussions on whether a DPA could be entered into. That was mentioned in court, and in fact a plea was not taken from the company on that date for that precise reason. It was mentioned to Her Honour Judge Deborah Taylor on the day that it would be best for the proceedings to be adjourned to allow those discussions to take place."[349]

280. Commenting on this evidence Max Hill QC, the Director of Public Prosecutions, wrote to explain that this was not the way the DPA procedure works.[350]

> "The current Code and Criminal Procedure Rules anticipate that all discussions with the corporate will be precharge. Therefore, if the corporate wishes the prosecution to consider issuing an invitation to commence formal negotiations in relation to a DPA, there will have to be preliminary discussions between the two to explore whether it would be a possibility. If, following these discussions, it appears a DPA may be an option then a letter of invitation will be issued as required by paragraphs 3.1–3.5 and 3.11 of the DPA Code. If, during these formal discussions, it appears the corporate has not brought itself within the eligible criteria then the prosecution will proceed. … The CPS did not issue a letter of invitation under paragraphs 3.1–3.5 and 3.11 of the DPA Code to Skansen, therefore that case did not reach the stage of formal negotiations."

While we are grateful for this explanation, we believe it is unfortunate that Counsel for the prosecution was understood to be giving a different impression.

281. Most of our witnesses did not believe that small companies were unfairly treated. Hannah von Dadelszen was clear that the size, structure or assets of a company would be relevant to calculation of the financial penalty, but would not on their own affect whether or not a DPA would be offered: "It is not about the money; it is about doing justice to the situation."[351] Michelle Crotty, the Director and Deputy Head of Office, Attorney General's Office, told us: "A self-referral in itself is not sufficient to get a deferred prosecution agreement. I do not believe [in the case of Skansen] it was related to the size of the organisation; it was more about the conduct once the referral had been made."[352] In the end, whatever other arguments there might have been in favour of offering a DPA to SIL, this would not have been possible simply because the company was dormant and had no assets. This was agreed by Iskander Fernandez.[353]

282. In oral evidence Mr Argar noted that there have now been 45 prosecutions of large companies, which he termed "a significant number", and only "a very small number" of DPAs, with one being "a small to medium-sized company". Consequently, Mr Argar said, "There is no aversion to prosecuting large companies … I do not think the evidence thus far on prosecutions and DPAs bears out the suggestion that this is weighted against smaller companies."[354]

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349 Q 203 (Iskander Fernandez)
350 Supplementary written evidence from the Crown Prosecution Service (BRI0057)
351 Q 117 (Hannah von Dadelszen)
352 Q 15 (Michelle Crotty)
353 Q 203 (Iskander Fernandez)
354 Q 199 (Edward Argar MP)

283. We believe it is too early in the life of the DPA regime to tell whether there is in fact a bias in favour of large companies being offered DPAs. We would be concerned if it transpired that this was the case, and we hope the CPS and SFO will ensure that smaller companies with fewer resources will be treated fairly and will be offered DPAs in appropriate cases.

Financial penalties

284. The first requirement that a DPA may impose on the company is "to pay to the prosecutor a financial penalty".[355] The judge, in approving the DPA, will need to be satisfied that the amount of the proposed penalty is appropriate, and will need to take into account paragraph 5(4) of Schedule 17 to the Crime and Courts Act 2013 which states:

> "The amount of any financial penalty agreed between the prosecutor and P must be broadly comparable to the fine that a court would have imposed on P on conviction for the alleged offence following a guilty plea."

285. Section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing for offences committed after 6 April 2010:

> "Every court—
>
> (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
>
> (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,
>
> unless the court is satisfied that it would be contrary to the interests of justice to do so."[356]

286. The Sentencing Council Guidelines on Reduction in Sentence for a Guilty Plea (the Guilty Plea Guidelines)[357] state: "The maximum level of reduction in sentence for a guilty plea is one-third." This maximum discount is to be granted only where the guilty plea is entered on the first day of the proceedings at the outset. A guilty plea entered subsequently attracts a maximum discount of one quarter, going down to "a maximum of one-tenth on the first day of trial having regard to the time when the guilty plea is first indicated to the court relative to the progress of the case and the trial date …. The reduction should normally be decreased further, even to zero, if the guilty plea is entered during the course of the trial."

287. There are however other guidelines specifically developed to deal with bribery cases: the Sentencing Guidelines for Fraud, Bribery and Money Laundering (the Bribery Guidelines).[358] These have a section dealing specifically with offences by corporate offenders, including offences under sections 1, 2, 6

355 Crime and Courts Act 2013, Schedule 17, paragraph 5(1)(a)
356 Coroners and Justice Act 2009, section 125(1)
357 Sentencing Council, *Reduction in Sentence for a Guilty plea Definitive Guideline* (June 2017): https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-Guide_FINAL_WEB.pdf [accessed 13 February 2019]
358 Sentencing Council, *Fraud, Bribery and Money Laundering Offences: Definitive Guideline* (October 2014): https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf [accessed 13 February 2019]

and 7 of the Bribery Act. Co-operation is referred to at Step Four as one of the "factors reducing seriousness or reflecting mitigation" which are to be considered by the court when determining whether any adjustment is required to the multiplier used for calculating the fine. For a corporate offender co-operation is described as follows: "corporation co-operated with investigation, made early admissions and/or voluntarily reported offending". In addition, the court is required, at Step Six, to "consider any factors which would indicate a reduction, such as assistance to the prosecution". Finally Step Seven, headed "Reduction for guilty pleas", states that "The court should take into account any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the Guilty Plea Guideline[s]."

288. Thus, while the Guilty Plea Guidelines appear to set a one-third discount as the maximum, in the Bribery Guidelines this is only the final step after any discounts for co-operation, self-reporting and assistance to the prosecution have already been made. This is clear from the DPA Code of Practice, which states that:

> "The extent of the discretion available when considering a financial penalty is broad. The discount for a guilty plea is applied by the sentencing court after it has taken into account all relevant considerations, including any assistance given by P [the company being considered for a DPA]. The level of the discount to reflect P's assistance would depend on the circumstances and the level of assistance given, and the parties should be guided by sentencing practice, statute and pre-existing case law on this matter."[359]

289. It is not the judge who initially decides the amount of any financial penalty and the discount, if any, which should apply. These will have been provisionally agreed between the prosecutor and the company during their negotiations on the terms of a DPA, and the judge will first become aware of them at the application for a preliminary declaration under paragraph 7 of Schedule 17. At that stage the court is considering whether entering into a DPA is "likely" to be in the interests of justice and that the proposed terms are fair, reasonable and proportionate. If at that stage the judge considers that the proposed financial penalty, or the proposed discount, is too low or too high, he has the opportunity to say so, to decline to make the declaration, and to suggest to the parties that they should make a further application with different terms.

290. Sir Brian Leveson told us that in one of the four cases to date he had not approved the application on the first occasion: "I made a number of points to the SFO and to the company concerned. In effect, I told them to go away and think again … They did think again. Then the parties came back and I was prepared to be satisfied."[360] Since the hearing was in private, we do not know the reason why Sir Brian did not approve the application on the first occasion, and whether this was in any way concerned with the financial penalty; but this would be the judge's opportunity to make sure that the proposed penalty and discount were appropriate.

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359 SFO, *Deferred Prosecution Agreements Code of Practice*, February 2014, para 8.4: https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf [accessed 4 March 2019]

360 Q 150 (Sir Brian Leveson)

291. In the first case, Standard Bank, Sir Brian Leveson concluded in his preliminary judgment that:

> "a court must take into account the stage in the proceedings the offender indicated his intention to plead guilty and the circumstances in which the indication was given. In the present case, Standard Bank promptly reported its own conduct and co-operated with the SFO's subsequent investigation: a full reduction of one third is therefore entirely justified and appropriate."[361]

"A full reduction of one third" is what is provided by the Guilty Plea Guidelines alone. It does not seem that Sir Brian was invited to consider whether a discount greater than one-third would be appropriate for any of the reasons given in steps Four or Six of the Bribery Guidelines.

292. In the next DPA case, XYZ was a small company, and in his preliminary judgment Sir Brian Leveson identified the nub of the matter as:

> "At what level of criminality is it necessary simply to allow the SME to become insolvent and to what extent is it appropriate to mitigate the financial penalty, knowing that the SME is only able to make any substantial payment with the support of the substantial company of which the SME is a wholly owned subsidiary?"[362]

Later in that judgment he stated:

> "In addition, given that the admissions are far in advance of the first reasonable opportunity having been charged and brought before the court, that discount can be increased as representing additional mitigation. In the circumstances, a discount of 50% could be appropriate not least to encourage others how to conduct themselves when confronting criminality as XYZ has."[363]

In his final judgment he accepted that, whatever the size of the discount, the sum calculated as the financial penalty would have been wholly unrealistic for XYZ, but he repeated that "discounting that sum for a guilty plea, a discount of 50% was appropriate."[364]

293. We have explained above how in the case of Rolls-Royce, the third and, at the date of this report, still the latest Bribery Act case resolved by way of a DPA, the company did not self-report. In the passage of his judgment dealing with the appropriate discount, Sir Brian Leveson began by stating: "It is argued that, taking into account the agreement by Rolls-Royce to resolve by way of DPA the broad range of conduct in the proposed draft indictment, a full reduction of one third of the proposed penalty is appropriate."[365] He then quoted the passage from his preliminary judgment in the XYZ case which we have quoted above, suggesting that a 50% discount would have

361 Preliminary judgment of Sir Brian Leveson P in *Serious Fraud Office v Standard Bank plc*, 4 November 2015, para 57.

362 Preliminary judgment of Sir Brian Leveson P in *Serious Fraud Office v XYZ Limited*, 24 June 2016, para 3, quoted in his final judgment in that case of 8 July 2016, para 4

363 Preliminary judgment of Sir Brian Leveson P in *Serious Fraud Office v XYZ Limited*, 24 June 2016, para 57, quoted in his judgment of 17 January 2017 in *Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc*., para 120

364 Final judgment of Sir Brian Leveson P in *Serious Fraud Office v XYZ Limited*, 8 July 2016, paras 23–24

365 Judgment of Sir Brian Leveson P in *Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc.,* 17 January 2017, para 119

been appropriate in that case. He went on to summarise the factors which demonstrated the "extraordinary co-operation" which the company had given, a view fully supported by the SFO,[366] and he concluded: "In order to take account of this extraordinary co-operation, I repeat the views which I expressed above and confirm that a further discount of 16.7% is justified taking the total discount of the penalty to 50%."[367]

294. Thus in the space of 14 months we moved from a full one-third discount being "entirely justified and appropriate" in a case of self-reporting (Standard Bank, November 2015), to a 50% discount being appropriate in a case of self-reporting "not least to encourage others how to conduct themselves when confronting criminality" (XYZ, June 2016), to a 50% discount being appropriate where the company, though it did not self-report, demonstrated "extraordinary co-operation" (Rolls-Royce, January 2017).

295. As we have explained,[368] Tesco was not a case of bribery but of false accounting contrary to section 17 of the Theft Act 1968. At the time we were taking evidence the DPA, and the judgment of Sir Brian Leveson approving it, were still subject to reporting restrictions which were lifted only on 23 January 2019. We can now see that Tesco self-reported and displayed what the SFO described as an "exemplary standard of co-operation". Sir Brian Leveson quoted from his judgment in the XYZ case, as he had in the Rolls-Royce case, and concluded that a total discount of 50% was justified.[369]

296. When the statutory provisions governing DPAs were receiving what was in effect their second reading, Lord Beecham, speaking for the Labour Opposition, said: "I confess to an initial reluctance to embrace a situation in which, in the area of economic crime … one class of defendants should have the opportunity of buying off a prosecution for a one-third discount or, to be more precise, an up to one-third discount, of the fine they might otherwise have to pay."[370] We think Lord Beecham's reluctance would have been greater, and widely shared, had he known that a one-third discount, far from being a maximum, might come to be treated as a starting point from which greater discounts might be calculated.

297. In relation to the Bribery Act cases Sir Brian Leveson told us:

> "Here [in the judgment] you can see in one place, or several places, how I have gone about the job, and you are entitled to say, "Actually, we don't think you've done this very well and therefore we will consider the legislation or provide a report that says this ought to be thought about differently".[371]

298. The discretion given to the judge is extremely broad. In each individual case Sir Brian had the advantage of considering all the details, with submissions from Counsel, before reaching his conclusion. We are therefore far from saying that he did not in each case reach the right conclusion. But, given

366 Paras 258–259 above
367 *SFO v Rolls Royce PLS (2017)*, para 123: https://www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf [accessed 4 March 2019]
368 Para 261 above
369 Final judgment of Sir Brian Leveson P in *SFO v Tesco Stores Ltd*, 10 April 2017, paras 93–95: https://www.judiciary.uk/wp-content/uploads/2019/01/sfo-v-tesco-stores-ltd-2017-approved-final.pdf [accessed 24 January 2019]
370 HL Deb, 30 October 2012, cols 571–572 (Lords Chamber on re-commitment)
371 Q 154 (Sir Brian Leveson)

the volume of evidence we have received on this issue, it is right that, as Sir Brian says, we should consider whether "this ought to be thought about differently"; whether amendments are needed to the statute, or whether the Bribery Guidelines, which apply specifically to offences under the Act but not expressly to DPAs, should be changed.[372]

299. The evidence we have received points in both directions. A number of firms of solicitors suggested in their written evidence that a 50% discount should be the starting point, and might even be too low. Stewarts commented that:

> "The latest move to increase the discount to one of 50% as a maximum available, from the 33% recommended by the Sentencing Council in the relevant Guideline, is insufficient. In the USA the comparable figure of 50% is used as a discount, but that is applied to the lowest range of financial penalty available. In the UK, that is not the case. The result is that the distinction in the UK is not sufficient and may well therefore deter initial self-reporting. No doubt this was not the intention but it requires urgent adjustment."[373]

300. Peters and Peters thought that "… the difference between a fine and confiscation post-conviction, and a financial penalty and disgorgement as part of a DPA is not sufficiently wide. Downward adjustment to the financial consequences which flow from a DPA may further encourage self-reporting."[374] Greenberg Traurig's view was similar: "… it remains the case that the marginal extra discount for going through a DPA process versus pleading guilty is 17%. We do not consider a 17% discount enough to encourage Self Reports to a material extent."[375] Pinsent Masons welcomed "the introduction of higher discounts as a means of making DPAs more attractive to companies and thus useful to prosecutors, particularly in light of the other substantial financial obligations imposed on companies under DPAs by way of compliance costs amongst others."[376]

301. We are not persuaded by these views. We do not agree that limiting the additional discount to 17%, over and above 33%, would discourage or deter self-reporting. These comments take insufficient account of the chief incentive towards self-reporting which a DPA brings: the avoidance of a criminal conviction. The total cost to Rolls-Royce of the DPA, leaving aside the cost to them of the investigation, and the compliance costs, but including disgorgement of profit, financial penalty with a 50% discount, and the costs of the SFO, amounted to over £500 million. If Rolls-Royce had received no discount at all their financial penalty, and so the total cost to them, would have increased by some £239 million, no mean sum even for a company of that size. But a criminal conviction would have made them ineligible for public procurement contracts amounting to up to 30% of their order book,[377] the cost of which would, we believe, have taken this into a different league.

302. Amanda Pinto QC suggested that "whether you are interested in public procurement contracts … is the only reason you would potentially go down

372 Schedule 17 to the Crime and Courts Act 2013 came into force on 24 February 2014. The Bribery Guidelines were effective from 1 October 2014, but make no mention of DPAs.
373 Written evidence from Stewarts Law (BRI0043)
374 Written evidence from Peters and Peters Solicitors LLP (BRI0023)
375 Written evidence from Greenberg Traurig (BRI0026)
376 Written evidence from Pinsent Masons (BRI0041)
377 Judgment of Sir Brian Leveson P in *Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc.*, 17 January 2017, para 53

a DPA route rather than take your chances in court".[378] There are other reasons. Standard Bank, with a conviction rather than a DPA, might have had to cease trading altogether in some jurisdictions. The DPA of HSBC cost that bank $1.9 billion in the United States, but a conviction might have forced the bank to cease trading there, and possibly in other jurisdictions. A further reason for a company to seek a DPA is that the court might not be inclined to offer the full discount, or any discount, to a company which, rather than self-reporting, waited for the conclusion of an investigation to see whether it would be charged, and only pleaded guilty at that stage.

303. Transparency International UK thought there was a danger that a discounted DPA settlement would, perversely, encourage corrupt acts if companies came to see the fines as a calculable cost of doing business that could be factored into a risk-reward analysis. They added: "We are concerned by the fact that the DPA discounting threshold has been unilaterally reduced from 30% to 50%[379] without any clear rationale and have further concerns that there will be ever-increasing discounting."[380] We too would be concerned if there was indeed "ever increasing-discounting", but we believe judicial supervision will ensure that this does not occur.

304. Corruption Watch were not in principle opposed to discounts even as high as 50% if this was needed to encourage self-reporting, but they had doubts as to the way the policy was being developed:

> "… if the ultimate policy aim of DPAs is to increase the detection of economic crime, it would be strongly advisable to offer higher discount rates (for instance 50%) in fine levels to companies that self-report, co-operate and implement corporate change, and significant but lesser discount rates (for instance 30%) to fine levels of companies that do not self-report but otherwise behave in an exemplary fashion. This policy should however be developed formally and through consultation. Corruption Watch is concerned that the decision by Sir Brian Leveson, the sole judge currently presiding over DPA hearings so far, to allow a 50% discount in fine level for companies being given DPAs, despite the fact that the Crime and Courts Act specifies only a 30% [sic] discount, raises serious questions about how DPA policy is being developed beyond the original scope intended by Parliament."[381]

305. The Crime and Courts Act 2003 does not itself specify any particular level of discount, but states that the amount of any financial penalty must be broadly comparable to the fine that a court would have imposed following a guilty plea. If the Guilty Plea Guidelines stood alone, it would certainly be arguable that any discount of more than one-third would be "beyond the original scope intended by Parliament". But, as we have said, under the Bribery Guidelines the discount for a guilty plea is only the last step in the calculation of the overall discount which should be applied to the financial penalty.

306. **We conclude that the legislation and the two sets of Guidelines, read together, provide adequate guidance, first to the prosecutors and then to the courts, on how to exercise their undoubtedly very broad**

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378 Q 166 (Amanda Pinto QC)
379 Sic. The reduction of the financial penalty is the result of the increase in the discount.
380 Written evidence from Transparency International UK (BRI0003)
381 Written evidence from Corruption Watch (BRI0039)

discretion governing the level of financial penalty and the discount which should apply in any particular case.

307. **When the Sentencing Guidelines for Fraud, Bribery and Money Laundering are next amended, they should make clear that they apply not just to sentences for those crimes, but also to the calculation of financial penalties in the case of deferred prosecution agreements, whether for offences under the Bribery Act or for other offences for which DPAs are permissible.**

308. Neither the Crime and Courts Act 2013, nor any of the other relevant legislation, nor the current Guidelines, suggest that there should be any distinction between a case which is self-reported and one which is not, when calculating the discount. We share the view of Corruption Watch that, if self-reporting is to be encouraged, it should attract a higher discount than cases which are not self-reported. We therefore believe that the highest level of discount should be available only to a company which has self-reported and given full co-operation. In other cases, even where there has been "extraordinary co-operation", a company which has not self-reported should normally receive a lesser discount than a company which has done so. And, as we have said, we believe that a company which has not co-operated fully with the prosecutor falls entirely outside the scope of the DPA regime and, if sufficient evidence is available, should be prosecuted for the alleged offence.

309. **If self-reporting is to be encouraged, a distinction should be drawn between the discount granted to a company which has self-reported and one which has not.**

310. **Although, strictly speaking, our recommendations are confined to offences under the Bribery Act, it would be invidious to have different provisions for other offences which can be the subject of DPAs.**

Prosecution of individuals

311. Susan Hawley, the Policy Director at Corruption Watch, told us: "Individuals being prosecuted where there is a DPA is crucial for public confidence. This issue of public confidence is universal wherever these instruments have been introduced. You have seen a lot of criticism in the US: why are senior executives getting off when these companies are just paying fines?"[382] This no doubt is why, as Roger Burlingame, a partner in Dechert LLP, explained to us, in the US co-operation to obtain a DPA "now entails providing human beings for the Government to prosecute".[383]

312. Self-reporting, and the negotiation of a DPA, inevitably involve the company in providing law enforcement agencies with evidence, information and analysis that it would otherwise be impossible or impractical for them to obtain. As Eversheds Sutherland pointed out, "That evidence, information and analysis may be leveraged to inform or assist the prosecution of culpable individuals."[384] Baker McKenzie made the same point: "The co-operation necessitated by the use of DPAs grants the SFO access to information which increases the likelihood of individual prosecutions and, in fact, forces companies to provide information and co-operate with the prosecutor in

382 Q 46 (Susan Hawley)
383 Q 183 (Roger Burlingame)
384 Written evidence from Eversheds Sutherland (BRI0024)

relation to the prosecution of individuals."[385] Paragraph 13 of Schedule 17 to the Crime and Courts Act 2013 sets out how that material may be used in subsequent proceedings.

313. Transparency International UK were concerned "that DPAs will be used as an almost automatic way of getting cases resolved off the books, which will lead to a fine for the company but will not result in individual prosecutions. …. It is clear that if corruption has occurred, individuals must be involved, both actively and complicity. Punishing senior individuals is the best possible deterrent to others."[386] Commenting on this Sir Brian Leveson said:

> "I will challenge the premise because I do not agree with it. Critical to my approach to DPAs over the four that I have done has been that those who are responsible for the criminality face prosecution. First, they are no longer in the company. What is not permissible for me is that the company self-reports but does not root out the cause of the problem, because, as I said at the very beginning, a company is just a structure, just the scaffolding. It is the people who are operating it. So I am afraid that I cannot contemplate agreeing a DPA if the people who were responsible for the corrupt payments or other criminality remained in the company. It would just demonstrate the fear that Transparency International identifies … It is absolutely critical that the individuals in these circumstances are prosecuted, however senior or junior in the company they are."[387]

314. Our only witness who showed any doubt about the relationship between DPAs and individual prosecutions was Pinsent Masons, who wrote:

> "The lack of a formal leniency policy or process for individuals, directors and business owners can act as major disincentive to self-report. Building in some degree of leniency process … to support individuals who are party to the decision to self-report would significantly increase corporate self-reporting."[388]

We do not know if this view is based on facts or is only speculation, but we believe that before any changes are considered there would need to be clear evidence to substantiate the view that self-reporting is being hindered by the involvement in the process of culpable individuals. If those individuals were still employed by the company it is unlikely that the company would qualify for a DPA at all, whether or not it had self-reported.

315. **We share the strongly held views of our witnesses that the DPA process, far from being an alternative to the prosecution of individuals, makes it all the more important that culpable individuals should be prosecuted.**

316. The material discovered by prosecutors during the DPA negotiations should assist this. We believe this view is shared by the prosecutors, who will bear in mind their Code of Practice: "It must be remembered that when [the company] self-reports it will have been incriminated by the actions

385 Written evidence from Baker McKenzie (BRI0030)
386 Written evidence from Transparency International UK (BRI0003)
387 Q 153 (Sir Brian Leveson)
388 Written evidence from Pinsent Masons (BRI0041)

of individuals. It will ordinarily be appropriate that those individuals be investigated and where appropriate prosecuted."[389]

317. **In negotiations for a DPA, the co-operation expected of a company must include provision of all available evidence which might implicate any individuals, however senior, who are suspected of being involved in the bribery being considered.**

318. Although there is no disagreement about the importance of a DPA being followed by the prosecution of the individuals involved, matters are not always so straightforward. In both the Tesco and the Rolls-Royce cases the company has been clear that its own criminal conduct was the result of criminal offences by named senior individuals, and this has also been the view of the SFO. In the Tesco case Sir Brian Leveson said:

> "Even more serious is that the investigation of Tesco Stores has revealed clear evidence of what amounts to a serious breach of the criminal law and, without reaching any conclusion (which, in the light of criminal prosecutions that are presently being pursued, at the time of this judgment is still to be determined), implicates senior management."[390]

Yet two of the supposedly culpable individuals were held to have no case to answer, and no evidence was offered against the third. In the Rolls-Royce case Sir Brian Leveson emphasised that "the investigation into the conduct of individuals continues and nothing in this agreement in any way affects the prospects of criminal prosecutions being initiated if the full code test for prosecution is met."[391] But on 22 February 2019 the SFO announced that "following a detailed review of the available evidence and an assessment of the public interest there will be no prosecution in this case".[392]

319. It is not for us to speculate on why in the Tesco case the evidence, much of it supplied by the company, was not strong enough for prosecutions of the individuals to succeed, or why in the Rolls-Royce case prosecution of the individuals was not even initiated.

Non-prosecution agreements (NPAs)

320. One of the questions in our call for written evidence asked what lessons might be learned from other countries. To this, Stewarts Law replied:

> "It is in our view essential that the 'NPA' addition in the USA be added to the resolutions available to companies. In the USA, where a self-report is accompanied by full co-operation throughout, it is to be presumed, absent identified features, that an NPA will follow. This additional disposal, added to that of the DPA, is clearly necessary as

389 SFO, *Deferred Prosecution Agreements Code of Practice*, February 2014, para 2.9.1: https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf [accessed 4 March 2019]

390 *Serious Fraud Office v Tesco Stores Ltd*, judgment of 10 April 2017, para 16: https://www.judiciary.uk/wp-content/uploads/2019/01/sfo-v-tesco-stores-ltd-2017-approved-final.pdf [accessed 25 February 2019]

391 *Serious Fraud Office v Rolls-Royce plc and Rolls-Royce Energy Systems Inc*., judgment of 17 January 2017, para 24.

392 SFO, Statements, 'SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals' (February 2019): https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/ [accessed 25 February 2019]

> … there would be an accompanying rebuttable presumption that, in defined circumstances, an NPA would follow."[393]

321. Roger Burlingame gave us evidence on international comparisons and explained that in the US the DPA was essentially a confession of misconduct, while the non-prosecution agreement (NPA) followed the same mechanism but did not involve a statement admitting wrongdoing:

> "When you have reached resolution with either the non-pros or the DPA you go to court and present the agreement and the court blesses it. There is some discussion among judges about whether they should be rubberstamps in this process. As a practical matter, judges do not play a role. They do not rewrite the agreement, dictate the terms or say whether they are fair."[394]

322. Mr Burlingame thought that UK corporate enforcement was "in its adolescence compared to a more mature system in the US." In his view two differences made the US Department of Justice more effective:

> "First, the regime offers more certainty. It does that at a certain cost, which is taking power away from judges and giving it to prosecutors. What companies want in resolving these issues is certainty. When you are dealing with DOJ prosecutors, they can give you the deal and that will be the deal."[395]

323. Plea bargaining has never been part of our criminal law. If the maturity and effectiveness of the US system does indeed come at a cost of taking power from judges and giving it to prosecutors, this is a cost we are not prepared to pay.

324. **We do not believe that the adoption of non-prosecution agreements along the lines of the United States model would add anything of value to the current law on DPAs.**

Conclusions

325. In our call for written evidence we asked for views on whether the introduction of DPAs had been a positive development in relation to offences under the Bribery Act. From all sides of the spectrum, the answer has been a resounding 'yes'. Sir Brian Leveson explained to us in detail why "having started from the position when I read the Bill that I was dead against them [DPAs], I am now in quite the other camp."[396]

326. The SFO told us in their written evidence:

> "The SFO view is that DPAs represent an outcome which ensures that justice can be done, whilst protecting the interests of innocent employees and shareholders as far as possible. A DPA is not a soft option and the penalties involved in a DPA are carefully balanced to punish the company involved appropriately without discouraging them from entering into a DPA."[397]

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393 Written evidence from Stewarts Law (BRI0043)
394 Q 183 (Roger Burlingame)
395 Q 179 (Roger Burlingame)
396 Q 150 (Sir Brian Leveson)
397 Written evidence from Serious Fraud Office (BRI0018)

In oral evidence the Director, Lisa Osofsky, and Hannah van Dadelszen, the Head of Fraud, supported this.[398] Michelle Crotty, the Director/Deputy Head of Office at the Attorney General's Office, thought DPAs had brought in a new relationship between the SFO and business in encouraging early self-referrals from business when they uncover behaviour that is not acceptable. She added: "Apart from the prosecution side of things, there is also some emerging evidence that they are encouraging business to proactively put in their own compliance regimes and so achieve the aim of the Act."[399]

327. From the other side of the spectrum, PwC wrote:

> "The introduction of DPAs has certainly been a positive development. Key benefits include: the powerful incentive on companies to self-report; the resulting potential increase in prosecutions of corporates and individuals, as the authorities are made aware of additional instances of offending; and potential for quicker and less costly resolution of criminal cases (albeit that this point must not be over-exaggerated since in complex cases conclusion of a DPA can still require significant time and resource, particularly as the authorities seek confirmation that no further wrongdoing is likely to be uncovered)."[400]

City solicitors who saw DPAs as a positive development included Baker McKenzie, Clifford Chance, Greenberg Traurig and Pinsent Masons.[401]

328. **We believe that in the short time they have been in operation deferred prosecution agreements have proved to be an excellent way of handling corporate bribery, providing an incentive for self-reporting and for co-operating with the authorities.**

398 Q 117 (Hannah von Dadelszen)
399 Q 6 (Michelle Crotty)
400 Written evidence from PwC (BRI0031)
401 Written evidence from Baker McKenzie (BRI0030), Clifford Chance (BRI0036), Greenberg Traurig (BRI0026) and Pinsent Masons (BRI0041)

CHAPTER 8: SMALL AND MEDIUM ENTERPRISES

Background

329. The size of small and medium enterprises (SMEs) creates specific challenges: on one hand, they lack the same resources as larger companies to implement anti-bribery procedures; on the other, SMEs can monitor employees more easily and can implement anti-bribery procedures on a proportionate scale. Therefore SMEs occupy a special position in relation to the Act, and may need to approach implementation differently.

330. In March 2013, when the Act had been in force 15 months, the House of Lords Select Committee on Small and Medium Sized Enterprises included in their report a two-page chapter on the effect of the Act on SMEs, concluding that the Act should be subject to post-legislative scrutiny "at the earliest opportunity".[402]

331. The report acknowledged that the introduction of the Act "led to a flurry of concern that SMEs would be particularly harshly affected".[403] The Committee received evidence to suggest that while some witnesses thought the Act had "enhanced the reputation of the UK in terms of business ethical standards," other witnesses thought the Act put the UK at a competitive disadvantage. Deltex Medical Ltd, for instance, argued the Act created "an imbalance with other markets" and potentially restricted "trading opportunities—for example in countries such as China and Brazil that do not conform to the same code of practice as the UK." Consequently, "Many Directors of SMEs are rightly concerned about being able to expand export markets whilst conforming to the Bribery Act."[404] Likewise, Tony Shepherd of Alderley plc robustly stated: "The existing Act is virtually impossible to operate as far as a UK company is concerned. You cannot really take someone out to dinner without committing a crime." The Institute of Directors (IoD) also noted that the Act was "counterproductive", especially when trading with Brazil, Russia, India and China (BRICs).[405]

Government action to date

332. Between the publication of the Ministry of Justice Guidance in April 2011, and 2013, the Ministry of Justice and the Foreign and Commonwealth Office engaged in various national and international awareness raising events.[406] In their Post Legislative Memorandum for the Act, the Ministry of Justice acknowledged a pre-existing disparity in knowledge of bribery legislation between SMEs and large companies:

> "From the beginning of the awareness raising activity it was recognised that large companies, especially those with a multinational presence, were already familiar with various compliance standards, including those of the US Foreign Corrupt Practices Act relating to bribery. It

402 Select Committee on Small and Medium Sized Enterprises, *Roads to Success: SME Exports* (Report of Session 2012–13, HL Paper 131), p 88
403 *Ibid.*, p 87
404 *Ibid.*, p 87
405 *Ibid.*, pp 87–88
406 Ministry of Justice, *Bribery Act 2010: Post Legislative Scrutiny Memorandum*, Cm 9631, June 2018, pp 23–24: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf [accessed 8 January 2019]

> was therefore anticipated that the challenge would be to influence the approach to bribery prevention in small and medium sized enterprises, who typically do not devote resources to monitoring compliance."[407]

333. In response to the Select Committee on Small and Medium Sized Enterprises' recommendation that the Government " … raise awareness amongst SMEs about the application of the Bribery Act 2010 and explain exactly how it will be applied in practice",[408] in July 2013 the then Department of Business, Innovation and Skills and the Ministry of Justice commissioned a survey of 500 SMEs, who were either exporting goods or were planning to do so. Although the survey had broadly positive results, with a large majority of companies aware of the Act, three quarters of those companies that were aware of the Act were not aware of the Ministry of Justice Guidance. Nine out of ten of the companies aware of the Guidance, however, found it to be useful.[409]

334. In oral evidence to us Kelly Tolhurst MP, Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy (BEIS), noted the "challenge" for SMEs of keeping "updated with all the regulation related to that business, particularly when new elements and requirements come through". According to Ms Tolhurst, the "quite concise" Quick Start Guide[410] allows an SME to "assess quickly whether or not it needs to delve further into something."[411] Additionally, the Government runs the 'great.gov.uk' website, which provides SMEs looking to export with compliance information and "clearly directs companies to some outside resources for training individuals within a business." Similarly, BEIS have "a small business support line, which enables small businesses to get in touch directly for specific advice or signposts."[412] Ms Tolhurst also outlined BEIS' interaction with representative bodies:

> "I meet the representative bodies regularly. This has not yet been brought up directly within those meetings, but we meet regularly—weekly, in some cases—and we also have the small business advisory board. It is something I am willing to bring up at advisory board level. We can always continue to work with the MoJ or even facilitate the MoJ contacting those representative bodies. We are committed to making sure small businesses get access to the right information, but I recognise that it is a challenge and that some of those businesses can sometimes be hard to reach."[413]

335. Given the difficulty in reaching SMEs, BEIS relies "on representative bodies such as the chambers of commerce to be a conduit, to impart information and deliver services to their memberships", although "the Bribery Act has not really been something that has been raised as an issue or a direct

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407 *Ibid.*, p 24

408 Select Committee on Small and Medium Sized Enterprises, *Roads to Success: SME Exports* (Report of Session 2012–13, HL Paper 131) p 88

409 Ministry of Justice, *Bribery Act 2010: Post Legislative Scrutiny Memorandum*, Cm 9631, June 2018, pp 24-5: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713452/bribery-act-2010-post-legislative-scrutiny-memorandum.pdf [accessed 4 March 2019]

410 Ministry of Justice, *The Bribery Act 2010: Quick start guide* (March 2011): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/181764/bribery-act-2010-quick-start-guide.pdf [accessed 10 January 2019]

411 Q 199 (Kelly Tolhurst MP)

412 *Ibid.*

413 *Ibid.*

barrier".[414] Ms Tolhurst has found that "While small businesses might be short of resources, they are not short of tenacity, drive and a determination to be successful and to do things right. We can always improve our support, but I think we are better. It is a continuous journey."[415]

336. In the same oral evidence session, Baroness Fairhead, Minister of State for Trade and Export Promotion at the Department for International Trade (DIT), added:

> " … we also offer up to five days of consultancy services under the Business Integrity Initiative. It is match-funded, so small companies will have to make a contribution, but that sort of hands-on guidance is what we are looking for. In addition, and this kills two birds with one stone, we have UK Export Finance, which helps support and finance small businesses; that is another big challenge they see when they are exporting. We also make sure we refer to the Bribery Act on the very first page, and make sure they understand they have to self-declare … UK Export Finance also works with other bodies to make sure the OECD anti-bribery and corruption guidelines are raised. We have guidelines which are above the current level. A new text has just been agreed and we were very active in supporting it. Again, we are providing on-the-ground support wherever we can and are trying to change the environment and culture in whichever way we can."[416]

The position of SMEs

337. Anecdotal evidence suggests that SMEs are more at risk of being in breach of the Act. In the case of section 6, they are less likely than larger companies to resist demands for facilitation payments, as discussed in Chapter 5.[417] In the case of section 7, smaller companies may not be aware of the adequate procedures defence, and may not have the means to seek legal advice as to what procedures they should put in place. They are also more at risk of prosecution for the substantive offences under sections 1 and 6 because the 'identification principle' makes it easier to identify the 'controlling mind' of an SMEs. As noted in Chapter 3, the SFO and Transparency International have argued for an extension of vicarious liability to corporate law generally.[418] However, as also noted, a change to the general law to make corporations vicariously liable for offences committed by their employees and agents would have a much wider application beyond the offences under the Bribery Act.

338. The evidence received from a number of witnesses who spoke of the difficulties for SMEs indicates that they are disadvantaged. The Aerospace Defence Security and Space Group, whose membership includes over 950 SMEs, stated that:

> "… we have heard of many cases where some SMEs just do not have the people or the time to do more than the bare minimum, which may not be enough, even for SMEs. SMEs cannot afford to spend much time and money on compliance, let alone worry whether their procedures are

414 *Ibid.*
415 *Ibid.*
416 *Ibid.*
417 Paragraphs 128–142
418 Written evidence from the Serious Fraud Office (BRI0018), QQ 157–58 (Lisa Osofsky), written evidence from Transparency International UK (BRI0003)

> "adequate", or not, and we believe that this needs to be addressed by legislators, particularly as we move to a post Brexit world and exporting becomes significantly more important. To that end, we would advocate consideration on the possible adoption of some simplified procedures for SMEs, which, whilst also not seeking to undermine the effectiveness of the Act, do offer a proportionate compliance procedure to organisations which lack the internal resources to be able to comply with the Act as it currently stands."[419]

339. In oral evidence Lesley Batchelor, Director-General, Institute of Export and International Trade, highlighted the relative lack of power available to wield by SMEs, drawing on her experience of working with small businesses over 20 years. Ms Batchelor illustrated this with an example of an owner or employee of an SME who refused to give a bribe while undertaking international business. Upon return to his family home, where his young family lived, he found that the electricity had been turned off. For Ms Batchelor, "We can have these high aspirations, but sometimes we need to think about the realities of what businesses are facing."[420] This view was reinforced in written evidence by the UK Anti-Corruption Forum, who argued "smaller businesses operating overseas are likely to have less gravitas or force when attempting to rebuff requests for bribes by corrupt officials than large, multi-national organisations."[421]

340. Likewise, organisations such as The Fraud Advisory Panel, Clifford Chance LLP, Fieldfisher LLP, Peters and Peters Solicitors LLP, Pinsent Masons LLP, and Baker McKenzie have argued that the significant cost involved in implementing anti-bribery procedures places SMEs at a disadvantage relative to larger companies.[422]

341. Carl Hunter, CEO of Coltraco Ultrasonics Ltd, maintained the opposite, denying that there were any such problems. Mr Hunter did "not believe this notion that smaller companies are incapable of dealing with exporting… If that is the case, I do not believe they are incapable of dealing with morality and legality. It rather assumes that only the larger companies have a monopoly on resources and knowledge that enables them to act in a particular way." As a consultant to various companies such as BAE Systems, Thalys, British Airways and United Airlines, Mr Hunter found that "in those larger companies there is an equal amount of ignorance and bad practice as you would find in smaller companies. Just because a company is larger, it is not necessarily better."[423] The Federation of Small Businesses, meanwhile, declined to give evidence to the Committee, saying they had nothing useful to say. From this it can perhaps be inferred that their members have few issues with the Bribery Act. Similarly, the SFO said they "are not aware of any major problems being identified with understanding the principles contained in the Act or implementing them" on behalf of SMEs.[424]

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419 Written evidence from the Aerospace Defence Security and Space Group (BRI0037)
420 Q 55 (Lesley Batchelor)
421 Written evidence from: the UK Anti-Corruption Forum (BRI0009)
422 Written evidence from: The Fraud Advisory Panel (BRI0020), Clifford Chance LLP (BRI0036), Fieldfisher LLP (BRI0005), Peters and Peters Solicitors LLP (BRI0028), Pinsent Masons LLP (BRI0041), and Baker McKenzie (BRI0030)
423 Q 56 (Dr Carl Hunter)
424 Written evidence from the Serious Fraud Office (BRI0018)

342. In written evidence, Interchange Solutions Ltd went so far as to suggest that SMEs actually benefit from the Bribery Act, which gives them a competitive advantage. They said that not only do "companies that have a properly embedded anti-bribery compliance programme within the business … not … face any negative impacts", but "through a robust business risk assessment process, they are better able to identify opportunities, build stronger local partner relationships thereby obtaining competitive advantage, yet knowing how to avoid bribery." According to Interchange Solutions, on an international level, SMEs who "have implemented ISO37001[425] have done so to gain competitive advantage in tenders" over their larger competitors, "especially where there is an increasing demand for stronger evidence of anti-bribery compliance such as in SMEs bidding for contracts with larger companies or for export reinsurance" such as UK Export Finance. The same principle, therefore, applies to the Bribery Act.[426]

343. Phil Mason, Senior Anti-corruption Adviser, Department for International Development, took a similarly positive view. Mr Mason stated in oral evidence that in lead up consultations to the Business Integrity Initiative, DfID did not receive "any complaints from UK companies that the Act is penalising them". On the contrary, the Act gave them protection by requiring them "to put proper systems in place and made them think about corruption", therefore changing their attitude towards bribery. Mr Mason noted that the National Crime Agency provides "a little credit card which people can show to others and they can say, 'I just cannot pay a bribe because I will be subject to enforcement at home'". On top of this, UK companies have gained a "reputational benefit from being associated with a UK that takes such a strong approach", using the example of an Asian business that established a UK operation for its export to Africa in order to reduce the pressure on its staff to pay for routine regulatory practices.[427]

344. However a range of evidence has suggested that the Ministry of Justice Guidance has been inadequately disseminated. There appears to be no active dissemination of the Guidance to either SMEs or larger companies, meaning the burden is on companies to be aware of the Guidance. Provision of information on the Guidance is therefore essential. This could be undertaken through the active dissemination of the Guidance by the Ministry of Justice to Chambers of Commerce and trade associations, which could then be used by then for training and briefing of SMEs.

345. **We conclude that, although small and medium enterprises may have particular problems with complying with the Act, the difficulties are not of such a scale as to make it necessary for them to have any special statutory exemptions. However, the Government should improve the situation of small and medium enterprises by taking steps to inform them better of the Ministry of Justice Guidance, for instance by circulating the Guidance to Chambers of Commerce and trade associations.**

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425 ISO37001 are international standards which specify requirements and provides guidance for establishing, implementing, maintaining, reviewing and improving an anti-bribery management system: https://www.iso.org/standard/65034.html [accessed 28 January 2019]

426 Written evidence from Interchange Solutions Ltd (BRI0007), a specialist provider of risk management services which gave evidence to the Joint Committee on the Draft Bribery Bill.

427 Q 129 (Phil Mason)

346. Interchange Solutions noted that the Guidance is not even mentioned on the updated DIT Exporting is Great ('great.gov.uk') website,[428] and any less formal guidance on the website is difficult to find.[429] Ms Batchelor has argued that "… we feel that the small to medium-sized businesses especially are confused and often unaware that this [bribery] exists until it is brought up and given to them as an issue. Then they make an on-the-spot decision. It is never planned for or built into their policies."[430]

347. The Exporting is Great website includes guides for exporting to all but a handful of foreign countries. Companies, especially SMEs, which are about to start exporting to particular countries may make these guides their first port of call. For a company considering exporting to Nigeria it is not helpful to find just the statement "Challenges: High level of corruption".[431] In the guides for most countries this is supplemented by the statement that "You should ensure you take the necessary steps to comply with the requirements of the UK Bribery Act", with a link to the Ministry of Justice Guidance, but this is scarcely more helpful. A fuller explanation, at least to make clear that bribery of a foreign public official is an offence under UK law, and that facilitation payments are bribes, should appear in the text.

348. The Guide on exporting to Bangladesh is better than most, and includes this statement:

> "One of the biggest challenges facing UK companies in Bangladesh is how to avoid paying 'speed money'. 'Speed money' is unofficial, under the counter payments to minor officials to expedite business. Politicians, bureaucrats and law enforcement officials often wield significant discretionary power and there have been some abuses. You should have in place regular due diligence procedures and up-to-date risk strategies when doing business in Bangladesh."[432]

Even this does not make clear that paying 'speed money' is a crime under UK law.

349. Furthermore, the UK Anti-Corruption Forum noted that "many SMEs are neither aware of the legislation nor the guidance, and are thus putting themselves at risk of criminal prosecution. As such it is essential that government maintain efforts to inform the wider business community of the requirements under the legislation and the available guidance." Essentially, the SMEs that are aware of the Bribery Act are unaware that compliance programmes "can be proportionate to the size of the business and the markets in which that business is working." Therefore, from this view, the extra cost of compliance for SMEs is a perceived rather than actual cost. To combat this, the UK Anti-Corruption Forum has suggested that "the UK and international chambers of commerce potentially have a greater role to play here."[433]

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428 Department for International Trade website: https://www.great.gov.uk/ [accessed 10 January 2019]
429 Written evidence from Interchange Solutions Ltd (BRI0007)
430 Q 54 (Lesley Batchelor)
431 Department for International Trade, *Exporting to Nigeria* (November 2016), para 2: https://www.gov.uk/government/publications/exporting-to-nigeria [accessed 23 January 2019]
432 Department for International Trade, 'Doing business in Bangladesh: Bangladesh trade and export guide', (updated 23 July 2015) para 2.1: https://www.gov.uk/government/publications/exporting-to-bangladesh/doing-business-in-bangladesh-bangladesh-trade-and-export-guide#uk-and-bangladesh-trade [accessed 23 January 2019]
433 Written evidence from the UK Anti-Corruption Forum (BRI0009)

350. In addition to these issues, there was a perception among some of our witnesses that a DPA was likely to be more readily available to a large company than to a small one. This issue is discussed in Chapter 7. Moreover, a number of witnesses argued that the Ministry of Justice Guidance did not provide sufficient guidance on how SMEs could provide a good defence. We discuss this in Chapter 6.

351. **The webpages of the Department for International Trade which are intended to help exporters should in the case of each country refer to any specific problems with bribery and corruption, and in particular to whether there are likely to be expectations of facilitation payments, and to the fact that these are illegal under UK law. There should be a link to the Ministry of Justice Guidance.**

CHAPTER 9: THE POSITION IN SCOTLAND

352. Although the Bribery Act extends to the whole of the United Kingdom, in a few areas there are differences in the relevant law and practice in Scotland. We have already discussed in Chapter 3 the question of inter-agency co-operation as it affects Scotland,[434] and in this chapter we consider the remaining issues: consent to prosecution, the statutory Guidance, and DPAs. For these we took oral evidence from Gillian Mawdsley, Secretary of the Criminal Law Committee of the Law Society of Scotland, and subsequently from Rt Hon James Wolffe QC, the Lord Advocate; Andrew Laing, Deputy Procurator Fiscal in the Crown Office and Procurator Fiscal Service (COPFS); and Denise McKay, Head of the Civil Recovery Unit.

353. We referred at the start of this report[435] to the fact that, while the Bribery Act extends to Scotland, some of the matters we consider are devolved matters for which the Scottish Government is responsible. The matters we consider in this chapter fall within that category and, as the Lord Advocate reminded us, are within the competence of the Scottish Parliament. Questions of policy in relation to this area would be matters for the Scottish Government collectively.[436]

Consent to prosecution

354. In Scotland all cases under the Bribery Act are referred to the Serious and Organised Crime Unit (SOCU) of the Crown Office and Procurator Fiscal Service (COPFS), which is a specialist, multi-disciplinary unit including experienced investigators, prosecutors and forensic accountants. SOCU oversees the investigation of such cases by law enforcement agencies and will identify any further enquiries which require to be conducted. SOCU receives many of the most evidentially complex cases that the COPFS has to deal with, involving hundreds of witnesses and thousands of documents.[437]

355. The Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 all extended to Scotland. Section 4 of the 1889 Act provided that prosecutions should not be brought "except by or with the consent of the Attorney General" which "as respects Scotland means the Lord Advocate". Section 2 of the 1906 Act provided that prosecutions should not be brought "without the consent, in England of the Attorney-General [sic] or Solicitor-General", but this provision did not apply to Scotland, and there was no equivalent Scottish provision. The 1916 Act did not create any new offences.

356. We have explained in Chapter 3[438] how in the Bribery Act the requirement for the consent of the Attorney General in England, Wales and Northern Ireland was replaced by a requirement for the consent of the DPP (or the DPP for Northern Ireland), the Director of the SFO or the Director of Revenue and Customs Prosecutions, despite the concerns raised by the Joint Committee on the Draft Bribery Bill.[439] The main provisions of the draft

434 Paras 91–93
435 Para 11
436 Q 142
437 Written evidence from Law Society of Scotland (BRI0042)
438 Paras 94–102
439 Joint Committee on the Draft Bribery Bill, *Draft Bribery Bill* (First Report, Session 2008–09, HL Paper 115-I, HC 430–I), Chapter 9

Bill being considered by the Joint Committee[440] did not at that stage extend to Scotland, so that the Joint Committee did not comment on the anomalous position that in Scotland the consent of the Lord Advocate was required for prosecutions under the 1889 Act but not under the 1906 Act. By the time the Bribery Bill was introduced, its provisions all applied to Scotland, but no provisions for consent to prosecutions in Scotland were included corresponding to those for England, Wales and Northern Ireland now in section 10 of the Act. There is accordingly no statutory requirement for the consent of the Lord Advocate to prosecutions of offences under the Bribery Act in the Scottish courts.

357. It seems that the provision for Lord Advocate's consent in the 1889 Act was a departure from the norm—perhaps an inadvertent departure. The Lord Advocate himself told us that "it is not the practice to provide expressly for consent of that sort in Scotland."[441] In a letter to the Chairman of 14 January 2019 Mr Argar explained that the Lord Advocate had had "universal title to prosecute crime in the public interest since 1587" and that section 10 of the Bribery Act followed normal drafting practice of not providing for the consent of the Lord Advocate to prosecutions. He referred us to a number of other statutes which include provisions for prosecutions to be brought in England, Wales and Northern Ireland only with consent, but which have no parallel provision for Scotland.[442]

358. Given that the consent of the Attorney General to prosecutions is no longer required, it would not have occurred to us to suggest that the consent of the Lord Advocate in his capacity as a Law Officer should be required. We are in any case recommending that there should cease to be a statutory requirement for the consent of the DPP (or the DPP for Northern Ireland), the Director of the SFO or the Director of Revenue and Customs Prosecutions in the other jurisdictions,[443] so it would be equally anomalous for there to be any change in the law or practice in Scotland.

359. **We see no reason for any change in the law and practice regulating the commencement of proceedings under the Bribery Act in Scotland.**

The Guidance

360. The Ministry of Justice Quick Start Guide to the Bribery Act makes no reference at all to Scotland. For the statutory Guidance, section 9(3) of the Act requires the Secretary of State for Justice to consult Scottish Ministers before publishing the statutory Guidance about procedures that commercial organisations should put in place to comply with section 7. This Guidance states that it is "for use in all parts of the United Kingdom", and that "the Scottish Ministers have been consulted regarding the content of this guidance". That however is the first and last reference to Scotland in this Guidance, which makes no reference to differences between the Scottish and English legal systems, Scottish practice, or the Scottish courts.

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440 Ministry of Justice, *Bribery: Draft Legislation*, Cm 7570, March 2009: https://www.gov.uk/government/publications/ministry-of-justice-bribery-draft-legislation-march-2009 [accessed 17 January 2019]

441 Q 143 (James Wolffe QC)

442 Borders, Citizenship and Immigration Act 2009, section 18; Investigatory Powers Act 2016, sections 3, 155, 173, 196 and 224; Data Protection Act 2018, section 197, Government Ministers supplementary written evidence (BRI0059)

443 Para 101

361. There is no guidance issued by the Scottish authorities dealing with the section 7 "failure to prevent" offence and the "adequate procedures" defence. The only guidance issued by the Crown Office is called *Guidance on the Approach of the Crown Office and Procurator Fiscal Service to Reporting by Businesses of Bribery Offences*.[444] This, as the title implies, deals with self-reporting by companies of offences which may be under sections 1, 2 and 6 of the Act as well as section 7. It begins:

> "To mark the commencement of the Act, and to highlight the Crown's commitment to encouraging good corporate governance and to creating a corporate culture in which bribery is not hidden, the Lord Advocate approved an initiative for businesses to "self-report" bribery offences. Under the initiative the Crown will accept reports from businesses … who wish to report the discovery by them of conduct within their organisation which may amount to an offence under the Act, with a view to consideration being given by the Crown to refraining from prosecuting the business and referring the case to the Civil Recovery Unit (CRU) for civil settlement. The Lord Advocate has approved an extension to the self-reporting initiative which has been in operation since 1 July 2011, when the Bribery Act 2010 came into force. The initiative has been extended until 30 June 2019."[445]

362. Gillian Mawdsley told us:

> "… there is no cross-referencing whatever between the two forms of guidance. At the very least, the Ministry of Justice guidance should cross-refer to Crown Office and Crown Office should cross-refer to Ministry of Justice. It is as if the two pieces of guidance have been drafted in silos and there is no interlinking. It seems that the Crown Office guidance is restricted to giving information about cross-jurisdictional cases and self-reporting, whereas the Bribery Act [Guidance] talks about six principles. I would expect a Scottish document to take cognisance of the six principles, and that is what I mean by cross-referencing."[446]

363. We think this is too simple a view. Companies doing business wholly or mainly in England and Wales might benefit from guidance on self-reporting in England and Wales, but are unlikely to need to refer to the Crown Office Guidance on self-reporting in Scotland. However companies doing business wholly or mainly in Scotland will need guidance on section 7 of the Act as much as those South of the border. They are unlikely to look for such guidance in a document on self-reporting. What they need is a link on a website they are likely to look at, like the COPFS website, to the MoJ Guidance; and when they find it, they need to find a document which takes account of the differences in the law and practice North of the border.

364. **The Secretary of State for Justice should amend the Guidance published under section 9 so that it deals adequately with the law and practice in Scotland. The Ministry of Justice and the Crown Office should ensure that each of their websites refers to both their sets of Guidance.**

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444 Crown Office and Procurator Fiscal Service, *Guidance on the approach of the Crown Office and Procurator Fiscal Service to reporting by Businesses of Bribery* Offences (June 2018): http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/guidance%20on%20the%20approach%20of%20the%20crown%20office%20and%20procurator%20fiscal%20service%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20-%20June%202018.pdf [accessed 4 March 2019]

445 *Ibid.*, paras 1–2

446 Q 82 (Gillian Mawdsley)

Civil Settlements and DPAs

365. As we explained in Chapter 7, the provisions on DPAs in Schedule 17 to the Crime and Courts Act 2013 apply only to England and Wales. Scotland has a civil settlement regime, utilising the civil recovery provisions in Part 5 of the Proceeds of Crime Act 2002, which the Law Society of Scotland described in written evidence.

Box 5: The Civil Settlement Regime

Under this initiative, businesses which discover bribery or corruption within their own organisation are encouraged to make a report to COPFS, having identified unlawful conduct and examined policies and processes which failed to prevent the conduct taking place. Through its solicitors, it submits a full report to COPFS, who will then investigate. The anticipation is that they may avoid prosecution and be referred to the Civil Recovery Unit (CRU) for civil settlement instead. An agreement may be struck with the company to pay a particular sum (reflecting the profit that has been earned from the criminal conduct) in return for not being prosecuted. The CRU acts on behalf of Scottish Ministers and is the enforcement authority for the civil recovery of the proceeds of unlawful conduct under Part 5 of the Proceeds of Crime Act 2002.

There are stringent conditions with which businesses must comply with if they are to be considered appropriate for the self-report initiative. That includes conducting a thorough investigation, disclosing the full extent of the criminal conduct that has been uncovered and by taking robust steps to prevent a repetition of that unlawful conduct. There is no guarantee that, in making a self-report, this will allow a company to avoid prosecution. Each case is evaluated on its own merits. The Serious Organised Crime Unit (SOCU), together with Crown Counsel, consider various factors in assessing the public interest in any prosecution and in deciding whether the civil settlement is appropriate. These factors include the nature and seriousness of the offence, whether senior management were complicit and the adequacy of the anti-bribery systems in place at the time of the unlawful conduct and those introduced subsequently. Detailed guidance is available on the COPFS website for businesses who wish to submit a self-report, which outlines the factors to be considered.

If it is in the public interest for criminal proceedings to be considered, SOCU will instruct an independent investigation by law enforcement and the information provided by the business may be used for this purpose. Alternatively, if the matter is referred for possible civil settlement, the CRU will carry out a comprehensive investigation that includes forensic accountancy input. That verifies the information provided by the business and assesses the appropriate level of settlement, i.e. the total value of the benefit which has been obtained by the business through the unlawful conduct. In the event that a settlement is reached with the company, directors and employees may still be prosecuted separately as individuals. Money which is recovered by way of civil settlement is also paid into the CashBack for Communities fund.

To date, five businesses have reached civil settlement in relation to bribery offences since the introduction of the self-report initiative. There are understood to be further cases currently under consideration. Those companies which have reached civil settlements include businesses operating in the oil and gas sector, freight and logistics and shipping industry. These cases have involved the payment of bribes by employees or subsidiaries, often overseas, in order to secure contracts. According to COPFS, the total value of funds to date recovered by way of civil settlement in respect of bribery is in excess of £8.3 million.

Source: Written evidence of the Law Society of Scotland, (BRI0042)

366. Civil settlements in Scotland thus have something in common with DPAs, in particular the avoidance by the company of prosecution and the disgorgement of profits, but there are significant differences:

- The scheme is non-statutory, and therefore liable to be applied differently in different cases.
- It is available only in the case of self-reporting, which is not an essential requirement for DPAs: see the Rolls-Royce case.
- The company has to disgorge the proceeds of its unlawful conduct, but there is no financial penalty.
- There is no judicial supervision of the scheme.
- Transparency: there is no requirement for the full text of the settlement to be published, or the reasons why it has been approved.

367. The lack of a financial penalty might make it appear that a company has little to lose by self-reporting, apart from the unlawful profits which it would have lost anyway if it was convicted following prosecution. However the Lord Advocate said:

> "I certainly would not accept any suggestion that the civil settlement option is any sort of soft option for the companies that engage in self-reporting. The Committee will have seen the self-reporting scheme. It requires a rigorous approach to the investigation and disclosure of the conduct involved. For its own part, the Crown takes a rigorous approach to interrogating that material. If the Crown is prepared to enter into a settlement rather than to prosecute, that decision itself is made following a rigorous consideration of where the public interest factors lie. The outcome of course for the company is the sanction of the publicity and the requirement in effect to make a full and candid disclosure, to put in place measures to prevent repetition and to make whatever payment is identified through the civil recovery process."[447]

368. Tom Stocker, a partner in Pinsent Masons working in Scotland, who has acted for three of the five companies which have to date completed civil settlements, agreed that they were not a "soft option". He added:

> "… for a company to be considered for a civil settlement it must submit a "self-report". That entails the company's solicitors submitting a fulsome [sic] written report which should set out the investigations undertaken, the facts of what has gone on, and, importantly, that those facts amount to bribery. In that regard the civil settlement regime is more onerous than the DPA regime of England & Wales which does not require a self-report (although I appreciate it is a factor) and which does not require a formal admission.[448] When the self-report and the requisite admission are made there is no guarantee given that the case will be dealt with by way of civil settlement. The self-reporting company is therefore taking

447 Q 144 (James Wolffe QC)

448 However in order to be considered for a DPA in England and Wales a company must acknowledge that there has been wrongdoing and, in the case of section 7, that the company's internal controls at the relevant time were not adequate. Entering into a DPA is not technically a guilty plea, but it is tantamount to one.

a major risk and any company that reports to COPFS has, in my view, acted both ethically and bravely."[449]

369. In the case of DPAs, Sir Brian Leveson regarded the supervision of the judiciary as "critical", pointing out that England and Wales do not have plea bargaining.[450] An agreement between officials of the prosecuting authority and a company to settle a case without prosecution will however in our view amount to plea bargaining if there is no judicial involvement and agreement. This is one vital element present in the DPA regime that is absent in civil settlements.

370. Another difference between the two regimes is the degree of transparency. When a DPA is approved by the court, the prosecutor (unless prevented by a court order) is under a statutory duty to publish the DPA itself, and the declarations of the court giving preliminary and final approval to the DPA, together in each case with the court's reasons.[451] Sir Brian Leveson said: "… there is no private deal between a prosecutor and a company that nobody ever hears anything about … The disinfectant of transparency in this area is absolutely critical."[452]

371. There is however no equivalent provision applying to civil settlements. This is not to say that they receive no publicity, and the Lord Advocate did not accept that there was a want of transparency: "In each of the civil settlement cases that we have already had, proactive publicity is given to the settlement by way of press releases and publications by the Crown Office."[453] This was confirmed by Andrew Laing, and we were subsequently sent examples[454] of the press releases issued in the case of some of the civil settlements, and of the articles in the press which these had generated. The Crown Office of course has no control over the press coverage, but it might have been fuller if the press notices had given more than just the briefest summary of the facts of the case. An indication of how the amount to be recovered was calculated would also be helpful to other companies considering self-reporting.

372. Gillian Mawdsley did not think this went far enough: "The fact that the information has to be gleaned partly from the Crown Office website, partly from a private firm's website, does not give us as full a picture as would be helpful in looking to provide guidance for future cases." And she pointed out that the websites of firms involved in civil settlements represented what they had done for their clients. She added: "Again, if you are a member of the public, would you know to look at those websites? Would you not expect information to be contained on the Scottish Government or Crown Office websites?"[455] In his supplementary evidence the Lord Advocate told us that he had "asked COPFS officials to create a single page on the Service's website which contains links to relevant information on the Bribery Act, for the benefit of business and of the general public."[456] While this may make it easier to access such information as there is on the website, it will do nothing to improve the quality of that information.

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449 Written evidence from Tom Stocker (BRI0055)
450 Q 154 (Sir Brian Leveson)
451 Crime and Courts Act 2013, Schedule 17, para 8(7)
452 Q 154 (Sir Brian Leveson)
453 Q 144 (James Wolffe QC)
454 Not published with the written evidence.
455 Q 87 (Gillian Mawdsley)
456 Supplementary written evidence from James Wolffe QC (BRI0056)

373. The Phase 4 report of the OECD also voiced concerns about transparency:

> "For Scotland, while there are no concluded foreign bribery cases, the press releases issued at the conclusion of the *Abbot Group* and *International Tubular Services* cases, which involve bribery of private sector actors in international business, are instructive. Those press releases provide limited information. The press release for *Abbot Group*[457] identifies the date of the offending and name of the company, and asserts that the amount recovered (GBP 5.6m) represents the advantage received by the company. However, missing are details about the location of the offending, the bribe recipient and the subsidiary involved, the value of the bribe, and how the advantage was calculated. The *International Tubular Services* press release lacks similar information. Both press releases state that "In view of any criminal investigation of others that may follow, it is not possible to provide any further details of the corrupt payments", but there does not appear to have been any other enforcement activity taken in connection with these cases. The Working Group would expect Scotland to provide more comprehensive information about any foreign bribery cases concluded in future."[458]

374. The conclusion of the OECD report was: "The lead examiners … encourage Scotland to adopt a scheme comparable to the DPA scheme in the UK to overcome the weaknesses apparent in civil settlements, and to achieve consistency across the UK with regard to the tools available to law enforcement authorities for the resolution of foreign bribery cases."[459]

375. The Lord Advocate told us: "The Scottish Government are well aware of the OECD recommendation that consideration be given to the introduction of deferred prosecution agreements in Scotland. They intend to give consideration to that recommendation." However, in oral evidence to us, France Chain, the Senior Legal Analyst in the Anti-Corruption Division of the OECD, explained that the OECD recommendation did not go so far:

> "We did not say per se that Scotland should do the same as elsewhere in the UK; we said that Scotland has civil settlements and the working group has said previously that these are not satisfactory in terms of transparency and because they are only confiscation. For that reason, we said, not that Scotland should do the same, but that it should consider putting things on the level, so that it is the same for companies no matter which side of the border they are working."[460]

376. Despite the Lord Advocate's robust defence of the civil settlement scheme, we remain concerned that it has no statutory basis, does not require the payment of financial penalties, has no judicial supervision, and has inadequate transparency. All these points would of course be resolved if the Scottish Government were to adopt the DPA regime in full. If they are not minded to go so far, we hope that they will bear these issues in mind when considering the OECD's recommendations, and indeed ours.

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457 This is one of the press releases we were sent.

458 Organisation for Economic Co-operation and Development Working Group on Bribery, Phase 4 Report on *Implementing the OECD Anti-Bribery Convention in the United Kingdom* (March 2017) para 157: http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf [accessed 8 January 2019]

459 *Ibid.*, para 154

460 Q 103 (France Chain)

377. **We invite the Scottish Government to consider adopting a system analogous to the DPA regime. This would ideally have a full statutory basis, and would include the requirement of judicial approval, the ability to impose a financial penalty in addition to the disgorgement of profits, and a high degree of transparency.**

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Overall assessment

1. The first draft Corruption Bill was subject to scathing criticism, and the Government did not proceed with it. The draft Bribery Bill, by contrast, has resulted in an Act which has been much praised. Our recommendations deal mainly with the implementation and enforcement of the Act. (Paragraph 38)

The offences of bribery and being bribed (sections 1 and 2)

2. We commend the Home Office's decision to look at options for a centralised reporting mechanism for bribery. (Paragraph 54)

3. The appropriate use of misconduct in public office charges is a separate issue being considered by the Law Commission, and we make no recommendation on this. However we believe that conduct which constitutes an offence under the Bribery Act should not be prosecuted as the common law offence of misconduct in public office. (Paragraph 60)

4. We invite the Intelligence and Security Committee to take evidence on the extent to which the section 13 defence is being used, and whether its use can in each case be justified; and, if they think fit, to make recommendations for the amendment or repeal of the provision. (Paragraph 67)

5. We recommend that the Director of the Serious Fraud Office and the Director of Public Prosecutions publish plans outlining how they will speed up bribery investigations and improve the level of communication with those placed under investigation for bribery. (Paragraph 78)

6. A lack of awareness of and training on the Bribery Act may be a contributing factor in the lack of bribery prosecutions. The Government should provide the resources for the City of London Police's Economic Crime Academy to expand its anti-bribery training programme, and should ensure that every police force has at least one senior specialist officer who has undertaken the training. (Paragraph 85)

7. The OECD has criticised a lack of co-operation and co-ordination between the many different bodies involved in the investigation and prosecution of bribery. We wait to see whether the National Economic Crime Centre will provide the necessary central focus. The Scottish prosecution authorities should have a permanent presence. (Paragraph 93)

8. The current requirement for prosecutions to be initiated only with the written consent of one of the Directors is too rigid. Subsections (3) to (7) of section 10 of the Act should be repealed and replaced by a provision allowing the Directors to delegate the power to initiate proceedings to officials, as they see fit. Subsections (8) to (10) should be repealed and equivalent provisions substituted for Northern Ireland. (Paragraph 101)

9. There are arguments for amending the general law to make corporations vicariously liable for offences committed by their employees and agents. However this goes beyond offences under the Bribery Act. We do not make any recommendation for a change in the law. (Paragraph 109)

10. Ensuring that the Government's Anti-Corruption Champion is a sufficiently high-level office-holder, with appropriate access to other ministers and

senior officials, is crucial for ensuring that decisions relating to corruption are acted on and seen through to completion. We believe that the right individual should be a minister to have the necessary influence to act as the Government's Anti-Corruption Champion, and should be provided with the appropriate support and resources. (Paragraph 115)

Corporate hospitality

11. We believe the attempts in the Ministry of Justice Guidance to explain the boundary between bribery and legitimate corporate hospitality are as clear as can be expected in the absence of any judicial interpretation of these provisions. Nevertheless, initially the Act may have had an overly deterrent effect. The Ministry of Justice should consider adding to the Guidance clearer examples of what might constitute acceptable corporate hospitality. (Paragraph 131)

Bribery of foreign public officials, and facilitation payments (section 6)

12. We agree with all our witnesses that it would be a retrograde step to legalise facilitation payments. All trends in the law in other jurisdictions are towards abolishing a facilitation defence. We do not recommend any change in the law. (Paragraph 146)

13. The Government must ensure that UK companies are provided with support on corruption issues in the countries to which they export, by properly trained and instructed officials. Even the smaller UK embassies must have at least one official who is expert in the local customs and cultures, or who can rapidly contact officials of foreign government departments on behalf of companies facing problems in this field. (Paragraph 152)

Brexit issues

14. It is clear that the fight against international bribery will be significantly impeded if there are not in force between the United Kingdom and the participating Member States of the EU, even for a short time, measures with equivalent effect to the European Arrest Warrant, the European Investigation Order and other EU mechanisms for investigation and enforcement. We hope that all those involved in the Brexit negotiations, for the EU as well as the UK, will bear this in mind. (Paragraph 166)

Failure to prevent bribery (section 7)

15. The Ministry of Justice should, in consultation with representatives of the business community, and especially of SMEs, expand the section 9 Guidance to give more examples and to suggest procedures which, if adopted by SMEs, are likely to provide a good defence. (Paragraph 193)

16. The Guidance should make clear that all businesses need to conduct a risk assessment, that all but the smallest are likely to need procedures tailored to their particular needs, and that staff will need to be trained to understand and follow those procedures. (Paragraph 194)

17. Once that Guidance has been amended, the Quick Start Guide should be withdrawn. (Paragraph 195)

18. We believe that it is unnecessary to amend the wording of section 7 of the Act, but that the statutory Guidance should be amended to draw attention to

the different wording in the Criminal Finances Act 2017 and in the HMRC Guidance to that Act, and to make clear that "adequate" does not mean, and is not intended to mean, anything more stringent than "reasonable in all the circumstances". (Paragraph 211)

19. In this field, as in any other, it is for companies and their advisers to determine whether activities they propose to undertake or procedures they propose to adopt will comply with the law. Government departments and agencies can and do issue general guidance, but it is not their task to give advice in individual cases. The Serious Fraud Office should not revive the practice they once adopted of offering such advice. (Paragraph 217)

20. We hope the Government will delay no more in analysing the evidence it received two years ago and in reaching a conclusion on whether to extend the "failure to prevent" offence to other economic crimes. (Paragraph 231)

21. If Government action includes further legislation, a decision will have to be reached on the wording of any due diligence defence. On the assumption, which we believe to be correct, that there is no intended or actual difference in meaning between "adequate" procedures and procedures which are "reasonable in all the circumstances", we believe the latter more clearly gives the intended meaning. (Paragraph 232)

Deferred prosecution agreements

22. Schedule 17 to the Crime and Courts Act 2013 should be amended to give the court greater discretion to manage the preliminary and final hearings in whatever way seems most appropriate. However a declaration approving a DPA and giving the reasons for it must be made in open court. (Paragraph 247)

23. We conclude that the legislation and the two sets of Guidelines, read together, provide adequate guidance, first to the prosecutors and then to the courts, on how to exercise their undoubtedly very broad discretion governing the level of financial penalty and the discount which should apply in any particular case. (Paragraph 306)

24. When the Sentencing Guidelines for Fraud, Bribery and Money Laundering are next amended, they should make clear that they apply not just to sentences for those crimes, but also to the calculation of financial penalties in the case of deferred prosecution agreements, whether for offences under the Bribery Act or for other offences for which DPAs are permissible. (Paragraph 307)

25. If self-reporting is to be encouraged, a distinction should be drawn between the discount granted to a company which has self-reported and one which has not. (Paragraph 309)

26. Although, strictly speaking, our recommendations are confined to offences under the Bribery Act, it would be invidious to have different provisions for other offences which can be the subject of DPAs. (Paragraph 310)

27. We share the strongly held views of our witnesses that the DPA process, far from being an alternative to the prosecution of individuals, makes it all the more important that culpable individuals should be prosecuted. (Paragraph 315)

28. In negotiations for a DPA, the co-operation expected of a company must include provision of all available evidence which might implicate any individuals, however senior, who are suspected of being involved in the bribery being considered. (Paragraph 317)

29. We do not believe that the adoption of non-prosecution agreements along the lines of the United States model would add anything of value to the current law on DPAs. (Paragraph 324)

30. We believe that in the short time they have been in operation deferred prosecution agreements have proved to be an excellent way of handling corporate bribery, providing an incentive for self-reporting and for co-operating with the authorities. (Paragraph 328)

Small and medium enterprises

31. We conclude that, although small and medium enterprises may have particular problems with complying with the Act, the difficulties are not of such a scale as to make it necessary for them to have any special statutory exemptions. However, the Government should improve the situation of small and medium enterprises by taking steps to inform them better of the Ministry of Justice Guidance, for instance by circulating the Guidance to Chambers of Commerce and trade associations. (Paragraph 345)

32. The webpages of the Department for International Trade which are intended to help exporters should in the case of each country refer to any specific problems with bribery and corruption, and in particular to whether there are likely to be expectations of facilitation payments, and to the fact that these are illegal under UK law. There should be a link to the Ministry of Justice Guidance. (Paragraph 351)

The position in Scotland

33. We see no reason for any change in the law and practice regulating the commencement of proceedings under the Bribery Act in Scotland. (Paragraph 359)

34. The Secretary of State for Justice should amend the Guidance published under section 9 so that it deals adequately with the law and practice in Scotland. The Ministry of Justice and the Crown Office should ensure that each of their websites refers to both their sets of Guidance. (Paragraph 364)

35. We invite the Scottish Government to consider adopting a system analogous to the DPA regime. This would ideally have a full statutory basis, and would include the requirement of judicial approval, the ability to impose a financial penalty in addition to the disgorgement of profits, and a high degree of transparency. (Paragraph 377)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Empey
Baroness Fookes
Lord Gold
Lord Grabiner
Lord Haskel
Lord Hodgson of Astley Abbotts
Lord Hutton of Furness
Lord Plant of Highfield
Baroness Primarolo
Lord Saville of Newdigate (Chairman)
Lord Stunell
Lord Thomas of Gresford

Declarations of interest

Lord Empey

Vice President, Institute of Export and International Trade

Baroness Fookes

No relevant interests declared

Lord Gold

Principal at David Gold & Associates LLP

Adviser to Rolls-Royce plc, Airbus SE, Serco plc

Former monitor of BAE Systems

Former Partner and Senior Partner, Herbert Smith

Lord Grabiner

Former member of the Joint Committee on the Draft Bribery Bill

Practising Queen's Counsel specialising in commercial work, including bribery cases

Lord Haskel

No relevant interests declared

Lord Hodgson of Astley Abbotts

Trustee, Fair Trials International

Lord Hutton of Furness

The Government's Anti-Corruption Champion 2007–2008

Lord Plant of Highfield

No relevant interests declared

Baroness Primarolo

No relevant interests declared

Lord Saville of Newdigate (Chairman)

No relevant interests declared

Lord Stunell

Member of the Committee on Standards in Public Life

Lord Thomas of Gresford

Former member of the Joint Committee on the Draft Bribery Bill

Practising Queen's Counsel at Goldsmith Chambers, Goldsmith Buildings, Temple, specialising in criminal advocacy, including fraud, and lectured on the Bribery Act in both London and Hong Kong

A full list of Members' interests can be found in the Register of Lords Interests: https://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/

Anne-Marie Ottaway, Specialist Adviser
Former Case Controller, Serious Fraud Office
Former Partner, Pinsent Masons LLP
Partner, Greenberg Traurig LLP

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at https://www.parliament.uk/business/committees/committees-a-z/lords-select/bribery-act-2010/ and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with ** gave both oral evidence and written evidence. Those marked with * gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

**	Nicola Hewer, Director of Family and Criminal Justice Policy, Ministry of Justice	QQ 1–25
**	Michelle Crotty, Director/Deputy Head of Office, Attorney General's Office	
**	John Penrose MP, the Government's Anti-Corruption Champion	QQ 26–36
**	Kathryn Higgs, Director of Business Integrity Programme, Transparency International	QQ 37–52
**	Susan Hawley, Policy Director, Corruption Watch	
*	Lesley Batchelor OBE, Director General, Institute of Export and International Trade	QQ 53–61
*	Dr Carl Hunter, CEO and Managing Director, Coltraco Ultrasonics Ltd	
**	Philip Bramwell, Group General Counsel, BAE Systems plc	QQ 62–70
**	Joanna Talbot, Chief Counsel, Compliance & Regulation, BAE Systems plc	
*	Mark Gregory, General Counsel, Rolls-Royce plc	
**	Keely Hibbitt, Group Head of Business Integrity, Balfour Beatty plc	QQ 71–80
*	Chris Blythe, OBE, CEO, Chartered Institute of Building	
**	Peter Carden, UK Anti-Corruption Forum	
**	Gillian Mawdsley, Secretary, Criminal Law Committee of the Law Society of Scotland	QQ 81–90
**	Mark Anderson, Partner and Head of Corporate Intelligence, PricewaterhouseCoopers (PwC)	QQ 91–97
**	John Bray, Director, Control Risks	
*	France Chain, Senior Legal Analyst, Anti- Corruption Division, Organisation for Economic Co-operation and Development (OECD)	QQ 98–104

**	Commander Karen Baxter, Commander, Police National Coordinator for Economic Crime, City of London Police	QQ 105–111
**	Mike Betts, Head of Learning and Skills, City of London Police Economic Crime Academy , City of London Police	
**	Hannah von Dadelszen, Head of Fraud, Serious Fraud Office	QQ 112–118
*	Mark Steward, Executive Director of Enforcement and Market Oversight, Financial Conduct Authority	
*	Cecilia Müller Torbrand, Program Director, Maritime Anti-Corruption Network (MACN)	QQ 119–126
*	Mark Jackson, CEO, Baltic Exchange	
*	Tim Springett, Policy Director, Employment and Legal, UK Chamber of Shipping	
**	Brook Horowitz, CEO, IBLF Global	QQ 127–134
**	Phil Mason, Senior Anti-Corruption Adviser, Department for International Development	
*	Dominic Le Moignan, Director of Government Projects, GovRisk	
**	Eoin O'Shea, Partner, Reed Smith LLP; Chair, Corporate Crime and Corruption Committee, City of London Law Society	QQ 135–140
**	Louise Hodges, Partner and Head of the Financial Services Group, Kingsley Napley	
*	Rodney Warren, Senior Partner, Warren's Law and Advocacy	
**	Rt Hon James Wolffe QC, Lord Advocate	QQ 141–148
**	Andrew Laing, Deputy Procurator Fiscal, Special Casework	
*	Denise McKay, Head of the Civil Recovery Unit	
**	Rt Hon Sir Brian Leveson, President of the Queen's Bench Division	QQ 149–154
**	Lisa Osofsky, Director of the Serious Fraud Office	QQ 155-161
**	Max Hill QC, Director of Public Prosecutions	
**	Hannah von Dadelszen, Head of Fraud, Serious Fraud Office	
**	Kristin Jones, Head of Specialist Fraud Division, Crown Prosecution Service	
*	Amanda Pinto QC, Vice-Chair of the Bar Council	QQ 162–167
**	Laura Dunseath, Principal Associate, Barrister, Corporate Crime and Investigations, Eversheds Sutherland	

**	Neil Swift, Partner, Peters and Peters	
*	Richard Rippin, NHS Counter Fraud Authority, England and Wales	QQ 168–176
*	Eddie McGinney, NHS Counter Fraud Services, Scotland	
*	Roger A. Burlingame, Partner, Dechert LLP	QQ 177–183
**	Dr Branislav Hock, Lecturer in Counter Fraud Studies, University of Portsmouth	
**	Donald Toon, Director of Prosperity (Economic Crime and Cyber Crime), National Crime Agency	QQ 184–190
**	James Mitra, Senior Operations Manager, International Corruption Unit, National Crime Agency	
**	Edward Argar MP, Parliamentary Under Secretary of State, Ministry of Justice	QQ 191–201
**	Rt Hon Ben Wallace MP, Minister of State for Security and Economic Crime, Home Office	
**	Kelly Tolhurst MP, Parliamentary Under Secretary of State, Minister for Small Businesses, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy	
**	Baroness Fairhead CBE, Minister of State for Trade and Export Promotion, Department for International Trade	
**	Iskander Fernandez, Partner, BLM	QQ 202–208

Alphabetical list of all witnesses

	Aerospace Defence Security and Space Group	BRI0037
	Affiliated Monitors, Inc	BRI0006
	Richard Alderman	BRI0065
**	Mark Anderson, Partner and Head of Corporate Intelligence, PricewaterhouseCoopers (PwC)	BRI0031
**	Edward Argar MP, Parliamentary Under Secretary of State, Ministry of Justice	BRI0059 BRI0064
	The Association for Financial Markets in Europe	BRI0012
**	BAE Systems plc	BRI0040
	Baker McKenzie	BRI0030
**	Balfour Beatty plc	BRI0045 BRI0063
*	Lesley Batchelor OBE, Director General, Institute of Export and International Trade	
**	Commander Karen Baxter, Commander, Police National Coordinator for Economic Crime, City of London Police	BRI0022

**	Mike Betts, Head of Learning and Skills, City of London Police Economic Crime Academy, City of London Police	BRI0022
**	City of London Police	BRI0022
*	Chris Blythe OBE, CEO, Chartered Institute of Building	
**	Philip Bramwell, Group General Counsel, BAE Systems plc	BRI0040
**	John Bray, Director, Control Risks	BRI0014 BRI0060
	British Exporters Association	BRI0034
*	Roger A. Burlingame, Partner, Dechert LLP	
**	Peter Carden, UK Anti-Corruption Forum	BRI0009
*	France Chain, Senior Legal Analyst, Anti- Corruption Division, Organisation for Economic Co-operation and Development (OECD)	
**	The City of London Law Society	BRI0025
**	City of London Police	BRI0022
	Clifford Chance LLP	BRI0036
**	Control Risks	BRI0014 BRI0060
**	Corruption Watch	BRI0039 BRI0044
**	Michelle Crotty, Director/Deputy Head of Office, Attorney General's Office	BRI0049
**	Crown Prosecution Service	BRI0057
	Sean Curran	BRI0048
*	Dechert LLP	
	Deloitte LLP	BRI0033
**	Laura Dunseath, Principal Associate, Barrister, Corporate Crime and Investigations, Eversheds Sutherland	BRI0024
**	Eversheds Sutherland Intl LLP	BRI0024
**	Baroness Fairhead CBE, Minister of State for Trade and Export Promotion, Department for International Trade	BRI0059
**	Iskander Fernandez	BRI0062
	Fieldfisher LLP's	BRI0005
	The Fraud Advisory Panel	BRI0020
	Fraud Lawyers Association	BRI0025
	Lord Garnier QC	BRI0038

	GIACC	BRI0032
	Greenberg Traurig	BRI0026
*	Mark Gregory, General Counsel, Rolls-Royce plc	
**	GovRisk	BRI0023
**	Susan Hawley, Policy Director, Corruption Watch	BRI0039
**	Nicola Hewer, Director of Family and Criminal Justice Policy, Ministry of Justice	BRI0049
**	Keely Hibbitt, Group Head of Business Integrity, Balfour Beatty plc	BRI0045 BRI0063
**	Kathryn Higgs, Director of Business Integrity Programme, Transparency International	BRI0003
**	Max Hill QC, Director of Public Prosecutions, Crown Prosecution Service	BRI0057
**	HM Government	BRI0059 BRI0064
	HM Prison and Probation Service	BRI0050
*	Dr Branislav Hock, Lecturer in Counter Fraud Studies, University of Portsmouth	
**	Louise Hodges, Partner and Head of the Financial Services Group, Kingsley Napley	BRI0054
**	Brook Horowitz, CEO, IBLF Global	BRI0023
	Professor Dan Hough, Director, Sussex Centre for the Study of Corruption (SCSC)	BRI0021
*	Dr Carl Hunter, CEO and Managing Director, Coltraco Ultrasonics Ltd	
**	IBLF Global	BRI0023
	Interchange Solutions Ltd	BRI0007
	International Chamber of Commerce UK	BRI0027
*	Mark Jackson, CEO, Baltic Exchange	
	Nathan Jensen, Professor in the Department of Government at the University of Texas-Austin	BRI0004
**	Kristen Jones, Head of Specialist Fraud Division, Crown Prosecution Service	BRI0057
**	Kingsley Napley	BRI0054
*	Andrew Laing, Deputy Procurator Fiscal, Special Casework, Crown Office and Procurator Fiscal Service	
	The Law Society of England and Wales	BRI0025
**	Law Society of Scotland	BRI0042
**	Dominic Le Moignan, Director of Government Projects, GovRisk	BRI0023

	Professor David Lewis	BRI0001
**	Rt Hon Sir Brian Leveson, President of the Queen's Bench Division	BRI0066
	Dr Nicholas Lord	BRI0019
	Major Event Organisers Association	BRI0013
	Edmund Malesky, Professor of Political Science, Duke University	BRI0004
**	Gillian Mawdsley, Secretary, Criminal Law Committee of the Law Society of Scotland	BRI0042
*	Eddie McGinney, NHS Counter Fraud Services, Scotland	
*	Denise McKay, Head of the Civil Recovery Unit	
	Metropolitan Police Service	BRI0035
**	Ministry of Justice	BRI0049
**	James Mitra, Senior Operations Manager, International Corruption Unit, National Crime Agency	BRI0052 BRI0061
*	Cecilia Müller Torbrand, Program Director, Maritime Anti-Corruption Network (MACN)	
**	National Crime Agency	BRI0052 BRI0061
**	Eoin O'Shea, Partner, Reed Smith LLP; Chair, Corporate Crime and Corruption Committee, City of London Law Society	BRI0025
**	Lisa Osofsky, Director of the Serious Fraud Office	BRI0018 BRI0051
**	John Penrose MP the Government's Anti-Corruption Champion	BRI0047
**	Peters and Peters LLP	BRI0028
	Ian Pigden-Bennett	BRI0053
	Pinsent Masons LLP	BRI0041
*	Amanda Pinto QC, Vice-Chair of the Bar Council	
**	PricewaterhouseCoopers LLP	BRI0031
	Monty Raphael QC	BRI0016
*	Richard Rippin, NHS Counter Fraud Authority, England and Wales	
*	Rolls Royce plc	
	Professor Jonathan J. Rusch	BRI0017
	Dr Nicholas Ryder	BRI0010
**	Serious Fraud Office	BRI0018 BRI0051

*	Tim Springett, Policy Director, Employment and Legal, UK Chamber of Shipping	
*	Mark Steward, Executive Director of Enforcement and Market Oversight, Financial Conduct Authority	
	Stewarts' Law LLP	BRI0043
**	Neil Swift, Partner, Peters and Peters LLP	BRI0028
**	Joanna Talbot, Chief Counsel, Compliance & Regulation, BAE Systems plc	BRI0040
**	Kelly Tolhurst MP, Parliamentary Under Secretary of State, Minister for Small Businesses, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy	BRI0059
	Tom Stocker	BRI0055
**	Transparency International UK	BRI0003
**	The UK Anti-Corruption Forum	BRI0009
**	Donald Toon, Director of Prosperity (Economic Crime and Cyber Crime), National Crime Agency	BRI0052 BRI0061
	UK Finance	BRI0015
	Haseeb Ur-Rehman	BRI0008
**	Hannah von Dadelszen, Head of Fraud, Serious Fraud Office	BRI0018 BRI0051
**	The Rt Hon Ben Wallace MP, Minister of State for Security and Economic Crime, Home Office	BRI0059
*	Rodney Warren, Senior Partner, Warren's Law and Advocacy	
**	Rt Hon James Wolffe QC, Lord Advocate	BRI0056

APPENDIX 3: CALL FOR EVIDENCE

Call for evidence

The Select Committee on the Bribery Act 2010 was set up on 17 May 2018. It has to report by 31 March 2019.

The task of the Committee is to carry out post-legislative scrutiny of the Act itself, its operation and its enforcement, and to make recommendations to the Government. The Committee has been specifically instructed to include in its remit consideration of Deferred Prosecution Agreements (DPAs) as they affect bribery. This is a public call for written evidence to be submitted to the Committee. The Committee is happy to receive submissions on any issues related to the Bribery Act 2010, but would particularly welcome submissions on the questions listed below. You need not address every question. The Committee is looking to hear from as many people and organisations as possible. If you think someone you know would have views to contribute, please do pass this on to them. The deadline for submissions is Tuesday 31 July 2018.

The questions set out below are intended to provide a framework for those who wish to offer their views.

Questions

Deterrence

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

Enforcement

2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

Guidance

3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

Challenges

4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

5. 5What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

6. Is the Act having unintended consequences?

Deferred Prosecution Agreements

7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced

the likelihood that culpable individuals will be prosecuted for offences under the Act?

International aspects

8. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

9. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

APPENDIX 4: ACRONYMS AND ABBREVIATIONS

ABA	American Bar Association
ABAC	Anti-Bribery and Anti-Corruption
ABC	Anti-Bribery and Corruption
ACCA	Association of Chartered Certified Accountants
ADS	Aerospace Defence Security and Space Group
AFA	Agence française anticorruption
AFME	The Association for Financial Markets in Europe
AGO	Attorney General's Office
AMI	Affiliated Monitors Inc.
APPG	All-Party Parliamentary Group
ASD	AeroSpace and Defence Industries Association of Europe
ASIFMA	Asia Securities Industry and Financial Markets Association
BBA	British Bankers' Association
BEIS	The Department for Business, Energy and Industrial Strategy
BEN	Business Ethics Network
BIS	Bank for International Settlements
BS	BS 10500 Anti-bribery Management System
BSI	BSI Standards Institution
CAEC	Committee on Arms Export Controls
CBI	Confederation of British Industry
CFA	Chartered Financial Analyst
CFA 2017	Criminal Finances Act 2017
CFPA	Corruption of Foreign Public Officials Act (US)
CIS	Common Industry Standards
CJEU	Court of Justice of the European Union
CJIP	Convention judiciaire d'intérêt public
COLP	Compliance Officers for Legal Practice
COPFS	Crown Office and Procurator Fiscal Service (Scotland)
CPD	Continuing Professional Development Certification Service
CPIB	Corrupt Practices Investigation Bureau, Singapore
CPS	Crown Prosecution Service
CRU	Civil Recovery Unit
CSI	Cyril Sweett International
CSR	Corporate Social Responsibility

CST	Chief Secretary to the Treasury (UK)
DAML	Defence Against Money Laundering
DCMS	Department for Digital, Culture, Media and Sport
DfID	Department for International Development
DIT	Department for International Trade
DOJ	Department of Justice (US)
DPA	Deferred Prosecution Agreement
DPP	Director of Public Prosecutions
DSFO	Director of the Serious Fraud Office
EACC	Ethics and Anti-Corruption Commission
EAW	European Arrest Warrant
ECC	Economic Crime Command
ECE	European Convention on Extradition
ECI	Ethics and Compliance Initiative
ECRIS	European Criminal Records Information System
EHRR	European Human Rights Report
EIO	European Investigation Order
ENRC	Eurasian Natural Resources Corporation Limited
ERA	Employment Rights Act 1996
EY	Ernst & Young
FCA	Financial Conduct Authority
FCO	Foreign and Commonwealth Office
FCPA	Foreign Corrupt Practices Act 1977 (US)
FDI	Foreign Direct Investment
FLA	Fraud Lawyers Association
FSA	Financial Services Authority
GCO	Government Commercial Organisation
GDPR	General Data Protection Regulation
GECS	Global Economic Crime and Fraud Survey
GFMA	Global Financial Markets Association
GIACC	Global Infrastructure Anti-Corruption Centre
GRECO	Group of States Against Corruption
HMCTS	Her Majesty's Courts and Tribunals Service
HMCPSI	Her Majesty's Crown Prosecution Service Inspectorate
HMG	Her Majesty's Government
HMRC	Her Majesty's Revenue and Customs

HMT	Her Majesty's Treasury
HSWA	Health and Safety at Work etc. Act 1974
ICAC	Independent Commission Against Corruption, Hong Kong
ICBC	Industrial and Commercial Bank of China
ICC	International Chambers of Commerce
ICU	International Corruption Unit
IFBEC	The International Forum on Business Ethical Conduct
IMG	Inter-Ministerial Group
IP	Identification Principle
ISO	International Organization for Standardization
JACU	Joint Anti-corruption Unit
JMLIT	Joint Money Laundering Intelligence Taskforce
K4D	Knowledge, Evidence and Learning for Development (Institute of Development Studies)
KYC	KYC Global Technologies
LRQA	Lloyds Register Quality Assurance
MCRB	Myanmar Centre for Responsible Business
MDP	Ministry of Defence Police
MENA	The Middle East and North Africa
MiFID II	Markets in Financial Instruments Directive 2014/65/EU
MLA	Mutual Legal Assistance
MOEA	Major Events Organisers Association
MoJ	Ministry of Justice
MoU	Memorandum of Understanding
NCA	National Crime Agency
NECC	National Economic Crime Centre
NPA	Non-Prosecution Agreement
OACU	Overseas Anti-corruption Unit
OECD	Organisation for Economic Co-operation and Development
ONS	Office for National Statistics
PACE	Police and Criminal Evidence Act 1984
PNR	Passenger Name Records
POCA	Proceeds of Crime Act 2002
PSCI	Public Sector Corruption Index
PwC	PricewaterhouseCoopers
SAR	Suspicious Activity Report
SC21	21st Century Supply Chains

SCSC	Sussex Centre for the Study of Corruption
SEC	Securities and Exchange Commission (US)
SFO	Serious Fraud Office
SIFMA	Securities Industry and Financial Markets Association
SIL	Skansen Interiors Ltd
SIS II	Second generation Schengen Information System database
SMCR	Senior Management Certification Regime
SME	Small and Medium Enterprises
SOCU	Serious and Organised Crime Unit (Scotland)
TI-UK	Transparency International UK
UAE	United Arab Emirates
UKBA	Bribery Act 2010
UKTI	UK Trade and Investment
UNCAC	United Nations Convention against Corruption
UNODC	UN Office on Drugs and Crime
WGB	Working Group on Bribery