

REFORMING BRIBERY: A SUMMARY OF OUR MAIN RECOMMENDATIONS

- 1 Bribery has been contrary to the law at least since Magna Carta declared, “We will sell to no man...either justice or right”. Most people have an intuitive sense of what “bribery” is. However, it has proved hard to define in law. The current law is both out-dated and in some instances unfit for purpose.
- 2 We propose repeal of the common law offence of bribery, the whole of the 1889, 1906 and 1916 Acts, and all or part of a number of other statutory provisions.
- 3 These offences will be replaced by two general offences of bribery, and with one specific offence of bribing a foreign public official. In addition, there will be a new corporate offence of negligently failing to prevent bribery by an employee or agent.
- 4 In the text below, the precise statutory terms and definitions have not always been used. The draft Bill must be consulted for these. Not all of our recommendations and draft clauses are discussed below.

THE GENERAL OFFENCES

- 5 The first of the general offences will be concerned with the conduct of the payer (P):

P will be guilty if, directly or indirectly, he offers, promises or gives an advantage to another, intending it to induce another person to do something improper (defined below), or to reward someone for behaving improperly (defined below).

EXAMPLE: P provides a friend (who works in the same company as X) £10,000 to give to X, to persuade X to send P confidential information about the company that P wants in connection with her own business.

- 6 The second of these offences will be concerned with the conduct of the recipient (R):

R will be guilty:

(a) if he requests or accepts an advantage, intending that he, or another, should in consequence behave improperly, defined below,

(b) if he requests or accepts an advantage and the request or acceptance itself constitutes improper behaviour, defined below,

(c) if he asks for a reward for improper behaviour, defined below, or

(d) if he behaves improperly, defined below, in anticipation or in consequence of requesting or accepting an advantage.

EXAMPLES:

(a) R asks P for £10,000 if he – R – or a colleague destroy supporting documents submitted by rival bidders for a contract P is seeking to secure with R's employer.

(b) R, a civil servant, asks for £1,000 for himself to process a routine application.

(c) R, a civil servant, asks for £1,000 from P as a reward, having processed P's application for a licence especially quickly.

(d) R, an agent, accepts P's bid for a contract on behalf of a company, because R expects P secretly to reward him personally; or, R accepts an undocumented personal reward from P for accepting P's bid for the contract.

- 7 These offences will be confined to activity of a business, professional or public nature. Distinctions between such activities will no longer be reflected in different offences, as such. Instead, the distinctions will be reflected in the different ways that P and R come respectively to commit their offences. In that regard, performance of a function or activity will be "improper" if it is carried out in breach of one or more of the following expectations (the "expectations" in question are those that a person of moral integrity would have):

- (1) An expectation that someone will perform a function or activity in good faith;
- (2) An expectation that someone will perform a function or activity impartially;
- (3) An expectation created by the fact that someone is in a position of trust.

EXAMPLES:

(1) R, an employee, invites bids for a contract, but makes it clear to the wealthiest bidder privately that he or she will look favourably upon their bid if he (R) is rewarded personally.

(2) R is a trustee who makes grants to a company's needy former employees. R agrees to consider making grants to a needy former employee – X – who is also a member of his own family, when X says he has made R a beneficiary under X's Will.

(3) In exchange for payment, R, a security guard, agrees to allow P on to company premises at night so that P - a director of a rival company - can go through confidential papers.

- 8 The general offences will apply to acts done outside the jurisdiction, if they would have amounted to an offence within the jurisdiction and the person accused is, amongst other possibilities, (a) a British citizen, (b) an individual ordinarily resident in the UK, (c) a body incorporated in the UK.

- 9 In that regard, we suggest that the Government enters into negotiations with Overseas Territories and Crown Dependencies over the extension of the law to bodies incorporated and persons ordinarily resident in those Territories or Dependencies.
- 10 An individual director, manager, or equivalent person who consents to or connives at the commission of one of these offences him or herself commits the offence.
- 11 The Director of the relevant prosecution authority must consent to a prosecution for these offences.
- 12 The penalties upon conviction are the same as for fraud. For example, in the most serious cases involving individuals, there may be a sentence of up to ten years' imprisonment following conviction on indictment.

BRIBERY OF A FOREIGN PUBLIC OFFICIAL

- 13 There will be a separate offence of bribing a foreign official ("FPO"). A definition of "Foreign Public Official" is provided. Paragraphs 8 to 12 above will also apply to this offence.
- 14 The offence will be committed if P offers or gives any advantage not legitimately due to a FPO, or to another person with the FPO's assent. P must offer or give the advantage, (a) intending to influence the FPO in his or her capacity as a FPO, and (b) intending to obtain or retain business:

EXAMPLE: P asks R, a civil servant in Blueland, to process quickly P's application for a licence to engage in construction work in Blueland. R says that will only be possible if P provides X, a relative of R, with help in the conversion of flats on X's land. P agrees to provide the help.

- 15 If the law applicable to F permits or requires F to accept an advantage, that advantage is "legitimately due":

EXAMPLE: P asks R, a civil servant in Blueland, to process quickly P's application for a licence to engage in construction work in Blueland. R says that will only be possible if P helps to build a new school in Blueland. P agrees to provide the help. The law applicable to R says that favourable treatment may be given to foreign businesses if they agree to fund genuinely charitable work in Blueland.

- 16 It is a defence for P to show that he or she reasonably believed that the law permitted or required R to accept the advantage, bearing in mind steps P has taken to find out the true position:

EXAMPLE: The facts are as in the example above. The law applicable to R says that favourable treatment may be given to foreign businesses if they agree to fund genuinely charitable work in Blueland. P checks the register of charities in Blueland, and it includes the company in charge of building schools to which P is to pay the money. Unknown to P or R, the company's charitable status expired a month before. The register had not been updated.

THE NEW CORPORATE OFFENCE

- 17 A company ("C") registered in England and Wales is guilty of an offence, punishable by a fine, if:

- (1) someone ("A") acting on C's behalf commits bribery;
- (2) the bribe was in connection with C's business; and
- (3) someone connected with C, whose functions included preventing bribery being committed by persons like A, negligently failed to prevent the bribery:

EXAMPLE: C decides to do business in Blueland. No one at C concerns themselves with whether bribes to secure business opportunities may be paid on C's behalf. C employs an agent (A) living in Blueland to establish business contacts on C's behalf with Government officials in Blueland. A bribes those officials to place contracts with C. The directors of C had given no guidance to A on their attitude towards bribery, even though it is well-known that officials in Blueland are open to bribery.

- 18 It is a defence for C to show that there were adequate procedures in place designed to prevent persons such as A committing bribery:

EXAMPLE: C wishes to do business in Blueland. C employs an agent (A) living in Blueland to establish business contacts on C's behalf with Government officials in Blueland. A bribes those officials to place contracts with C. C can show that they gave their regional manager the task of ensuring that all foreign agents complied with the company's anti-bribery policy. The regional manager had failed in her task, as she was busy looking for a job with a rival company.

- 19 However, this defence will not apply if the person or persons whose responsibility it was to prevent the bribery was a director, manager, or equivalent person within C.

20 In spite of the inevitable complexity of some of recommended provisions, we believe that it will be perfectly possible to capture the essence of our three main recommended offences of bribery in plain language and in a short form. In this way, adequate guidance can be given to those who do not, unlike lawyers dealing with legal cases, need to know the full legal details.

21 In that regard, it will generally be sufficient guidance to those in a position to make payments to say:

Do not make payments to someone (or favour them in any other way) if you know that this will involve someone in misuse of their position.

22 In that regard, it will generally be sufficient guidance to those in a position in which they may receive payments to say:

Do not misuse your position in connection with payments (or other favours) for yourself or others.

23 It should in general be sufficient guidance to those dealing with foreign public officials to say:

Do not deliberately use advantages to try to influence foreign public officials for business reasons, without a legal justification.

