HOUSE OF LORDS COMMITTEE ON THE BRIBERY ACT

RESPONSES TO CALL FOR EVIDENCE

INTRODUCTION

This submission is made on behalf of the Law Society of England and Wales, the City of London Law Society and the Fraud Lawyers Association.

The Law Society of England and Wales is the professional body for the solicitors' profession in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to Parliament, Government and regulatory bodies and has a public interest in the reform of the law.

The City of London Law Society represents 17,000 solicitors practising in the City of London which tend to have both a national and international commercial clientele.

The Fraud Lawyers Association ("FLA") was founded in 2012 to educate and train its members in all matters relating to their practice as fraud lawyers. Its membership consists of several hundred solicitors and barristers who practice mainly in the area of criminal and/or civil fraud.

The individuals contributing to this response are listed below. Of course, the views expressed herein may not represent the views of all individual members or firms, several of whom may wish to make their own submissions to the Committee.

DETERRENCE

1. IS THE BRIBERY ACT 2010 DETERRING BRIBERY IN THE UK AND ABROAD?

1.1 As far as deterrence in the UK is concerned, the answer, in our opinion, is "yes". Many UK-based clients of member-firms are more aware of the serious criminal consequences of bribery, especially overseas bribery, as a result of the Bribery Act.

1.2 We would say the same about overseas clients, at least those who consult lawyers in the UK. There is a widespread awareness of the Bribery Act among international businesses in particular. Of course, it is unlikely that UK legislation has had a significant impact on the international "demand side" of bribery, for example the conduct of any corrupt foreign public officials.

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?

2.1 Successful prosecutions under sections 1, 2 and 7 and the ability to use Deferred Prosecution Agreements (DPAs) are cited by the Ministry of Justice post-legislative scrutiny memorandum in support of its contention that *"the Bribery Act has fulfilled the functions that Parliament intended it to perform in the seven years since it became law"*. However, although prosecutions are now more common they are still unusual.. There have been no prosecutions under section 6, a total of 16 for sections 1 and 2 and just 2 prosecutions under section 7.

2.2 In terms of resource, the changes to the SFO's funding arrangements which were announced in April 2018 are welcome. Better investment in permanent staffing and a reduced reliance on contractors should have a positive impact in relation to the expedited resolution of investigations. It should be noted however that SFO pay and conditions are not only below what the corporate criminal defence sector will offer, but also believed to be below those of the FCA.

2.3 The SFO is able to guarantee a high quality of work to its employees (in terms of the most complex investigations). Nevertheless, it appears that a problem in terms of recruitment and retention remains, perhaps because pay and conditions are uncompetitive, and also because of the duration of investigations. It may be unlikely that an employee would see a five-year case through from the start to its conclusion. There is a strong case for better pay for SFO staff in order to attract and retain more high- quality candidates.

2.4 Whilst investigations into bribery and corruption will very often be complex, frequently involving overseas jurisdictions, a better-resourced SFO and CPS (both in terms of numbers of people and specialist knowledge) would be able to speed up these investigations, meaning more effective evidence gathering and, for those prosecutions which rely on witness evidence (and therefore a degree of memory), better justice outcomes. Defendants experience lengthy investigations, with extended periods during which little activity is apparent.

2.5 The effectiveness of the SFO's pursuit of overseas corruption is dependent to a large degree on its ability to secure formal and informal international cooperation. The extent to which existing criminal justice cooperation within the EU will be affected by Brexit is still very unclear but will inevitably suffer as cooperation mechanisms continue to evolve among the EU27. The deterrent effect of the Bribery Act outside the UK could suffer if there were any perceived decline in the SFO's ability and willingness to pursue companies and individuals for their conduct overseas.

2.6 For example, the European Investigation Order (EIO), introduced in July 2017. The EIO provides prosecutors with a much speedier tool to obtain evidence from overseas. Its effects are yet to be felt from the defence side. This may be because the use of the EIO is yet to bed in, or it may be because the investigations which have used EIOs are yet to reach court. However, the future of this instrument of mutual recognition in the UK is in doubt because of the unknown consequences of Brexit. If the security arrangement that the UK comes to does not include the retention of the ability to use the EIO, this will amount to a step backwards for law-enforcement generally and the enforcement of bribery and corruption laws in particular. The same can be said for the European Arrest Warrant (EAW) which allows a prosecuting authority to seek the surrender of a wanted person from an EU member state without undergoing lengthy extradition proceedings.

2.7 In terms of approach, the practices adopted by the SFO in investigations involving Bribery Act 2010 offences attract many of the same concerns which have arisen in connection with the SFO's investigations more generally. Although these concerns are not particular to the Bribery Act they can be seen to be exacerbated in overseas corruption cases precisely because these tend to be large-scale investigations spanning multiple jurisdictions, multiple suspects and raising complex legal issues.

2.8 For example, the introduction of amended guidance for independent legal advisers representing witnesses required to attend interviews under section 2 of the Criminal Justice Act 1987 may well have had an adverse impact on the willingness of witnesses to assist the SFO. Under section 2, witnesses are compelled to answer questions under peril of criminal sanction. The SFO guidance seeks to limit the actions that can be taken by a solicitor when acting for someone under section 2 and suggests a series of undertakings to be given by the lawyer in advance of the interview, sometimes putting them in potential conflict with their professional duties. This approach is short-sighted. Introducing such an adversarial tone to dealings with witnesses may well deter witnesses from assisting further.

2.9 This discussion has focussed on enforcement efforts by the SFO. Of course, there should be consistency of approach between the SFO and those of other agencies with enforcement responsibilities, for example the FCA, CPS and NCA.

2.10 The Committee might care to note the paper published by Transparency International in 2015 entitled "Exporting Corruption, Progress Report 2015". This compares enforcement efforts in various jurisdictions and offers the view that the UK is actively enforcing its legislation, alongside Germany, Switzerland and the US.

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?

3.1 The existence of guidance was initially helpful for businesses during the implementation and early stages of the Act. However, the present guidance requires review and regular updating, in the same way as the Joint Money Laundering Steering Group Guidance. A version of the Quick Start Guide should be retained.

3.2 Businesses in the UK and overseas find some areas of the guidance to be confusing, especially around Section 6, bribery of a foreign public official, on exactly how the local law provision should work, and on what is said in the guidance about hospitality. There is a more profound problem about the efficacy of any guidance in relation to highly fact-sensitive defences, and how this can be communicated to businesses, as to which see section 4, below.

3.3 In the case of other major pieces of legislation there have been some successes as regards oversight and maintaining currency of guidance by means of a group of contributors from appropriate fields to keep the guidance under review. Examples include the PACE Review Board and the Joint MoneyLaundering Steering Group.

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?

4.1 This is a complex subject which is not susceptible to any but the most generalised of answers. Industry bodies such as the CBI may be able to provide specific information about general awareness of the Act and take-up of ABAC procedures among member-companies.

4.2 As lawyers in private practice, our experience suggests that the majority of UK-based businesses which are not SMEs and which have exposure to export markets have at least an awareness of the Bribery Act and have attempted to respond by putting written ABAC

policies in place. The majority of these will have had some regard to the statutory guidance when doing so.

4.3 The main challenge for many businesses is likely to stem less from the terms of the guidance, or any potential guidance, but from the nature of the defence itself. There is, in the UK, no safe-harbour or one-size-fits-all solution: what is "adequate" is ultimately a jury question and each case will depend on its own facts.

4.4 Moreover, even before a procedure is examined by a court, it is inevitable that what is sufficient or adequate is in the eye of the beholder. A business may feel it has invested sufficiently in ABAC procedures and that it cannot be expected to detect every possible infraction. But the starting point of a regulator or prosecutor is more likely to be that written procedures will be *ipso facto* inadequate if they have failed to deter the bribery in question or at least detect it within a very short time.

4.5 The Criminal Finances Act of 2017 (ss. 45, 46) also provides for a "failure to prevent" offence as regards facilitation of tax-evasion, modelled on S.7 of the Bribery Act, subject to a similar defence. However, the defence hinges on a different standard. The standard under the CFA is not "adequate" procedures but "such prevention procedures as it was **reasonable in all the circumstances** to expect B to have in place"[1] .

4.6 This may be seen as recognition by Parliament that the "adequate procedures" defence presents a particularly high bar to defendant companies and that a standard approximating to taking reasonable care is more appropriate, at least in cases of failing to prevent facilitation of tax-evasion.

4.7 Bribery is a different offence for which Parliament has set the standard of adequacy of procedures rather than that of reasonable expectation. This may have been justified on the basis of the particular gravity of bribery as an offence. However, the fact that a specific standard is more difficult to identify in particular cases of bribery gives rise to uncertainty as to whether a procedures defence will ever be acceptable in such a case.

4.8 This in turn gives rise to a sufficiency problem. How much investment in compliance, audit, KYC, legal advice and other processes, and how much caution in dealing with counterparties, will be enough? It is very difficult indeed for any company to answer such questions with confidence in circumstances where all but the most minor infractions will be seen as evidence that its efforts were inadequate. This is notwithstanding the plethora of commercially-available products which offer to assist companies in this endeavour.

4.9 Thus the "real world" answers to the question of sufficiency will be subjective and may vary quite widely according to each business's circumstances and their assessment of and attitude towards risk.

4.10 There are some examples of practice as regards guidance which we believe may be instructive for the UK. The US Department of Justice is less cautious about making positive recommendations as regards good corporate conduct than the SFO has been in recent years. The DOJ is permitted to publish "declinations", i.e. decisions against prosecuting a particular firm, giving reasons, which are usually based on identified good conduct by the firm in question.

[1] Or whether it was reasonable in all the circumstances to expect B to have **any** prevention procedures in place.

4.11 US DPA decisions often also refer to a proposed compliance programme which the company has agreed to enter into and which is, obviously, approved of by the DOJ. In some instances, US law also permits companies to obtain "safe harbour" protection in relation to specific future transactions by seeking the opinion of the DOJ as to whether the transaction would infringe the FCPA. These practices provide a more developed framework within which businesses can benchmark their ABAC procedures. They may be seen as demonstrating that a more prescriptive approach to good practice is not necessarily harmful to prosecutorial zeal and effectiveness.

4.12 However, no matter how much guidance exists, it important for businesses to understand that mere written procedures are not a panacea and that effective ABAC procedures require ongoing commitment and vigilance.

4.13 Similarly, law-enforcement authorities and prosecutors should also understand the nature of the defence. A defence based on adequate procedures means that there must be a margin for good faith error – i.e. that not every incident or particular pattern of bribery is proof of the inadequacy of the procedures. If it were, then the defence would be meaningless in every case.

5. WHAT IMPACT HAS THE BRIBERY ACT 2010 HAD ON SMALL AND MEDIUM ENTERPRISES (SMES) IN PARTICULAR?

5.1 Again, it is difficult to offer more than anecdotal evidence in this regard. Business representative groups such as the Federation of Small Business and the Institute of Directors may be better placed to enlarge upon this question.

5.2 During the passage of the Bill and the coming into force, there was much publicity about the changes the Act would bring. Training for business was available from various sources and a state of awareness was achieved amongst senior managers in many businesses, including SMEs.

5.3 Anecdotal evidence is of reduced levels of demand for training in these areas by SMEs as time has gone on. Recently the pre-occupation with GDPR has been a higher focus for many small businesses. The extent of the take up and demand for certification standards such as ISO 37001:2016 Anti-bribery management systems would be a useful indicator of current awareness.

6. IS THE ACT HAVING UNINTENDED CONSEQUENCES?

6.1 As outlined in our response to Q.1 and Q.2, it appears to us that the Bribery Act has achieved two of the main intended consequences, i.e. increases in deterrence and increases in

prosecution-rates. Another consequence is that the UK is seen as taking a lead against international bribery by having comprehensive legislation in place, although this was probably also intended by HM Government.

6.2 However, of course, un-intended consequences are also entirely possible. For example, our membership is aware of anecdotal evidence that some companies subject to UK jurisdiction have curtailed investments in more high-risk countries because of concerns about liability under the Bribery Act. We have been told of concerns about competition from less ethical competitors. It would be useful to study to what extent international investment-flows have been impacted by domestic legislation such as the Bribery Act. We would accept that at least some impact is likely. No doubt the corporate hospitality industry might have evidence of the impact of the Act on sponsorship of sporting events and so forth.

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?

Positive Development?

7.1 The introduction of the DPA legislation was used as an opportunity to raise awareness of the Bribery Act. Although DPAs are available for a number of offences which can be committed by corporates (not just Bribery Act offences) many publications and discussions linked the two when the DPA legislation was first introduced, the section 7 offence being highlighted.

7.2 There have only been four DPAs finalised to date and therefore it is difficult to draw any meaningful conclusions about their impact. However, three of the four DPAs related to offences under the Bribery Act. The DPAs and the large penalties imposed thereby resulted in publicity about the Act and the type of offending targeted by it. Although there has been speculation about other DPAs in the pipeline, it is now 18 months since the last DPA dealing with Bribery Act offences was announced by the SFO.

7.3 DPAs involve compromise. It could be argued that not prosecuting a company which has committed offences is to let it off the hook by avoiding a conviction. However, it is difficult to see how the objectives of incentivising self-reporting and businesses "cleaning their own houses" as regards bribery could be more effectively achieved in the absence of an available resolution similar to a DPA.

7.4 Although DPAs involve the publication of the Court's Judgement, Statements of Facts and the Deferred Prosecution Agreement itself, they are not a mechanism by which key concepts fundamental to the Act itself (for example the S.7(2) defence or the proper scope of the associated persons concept) are contested in argument. Both parties arrive before the court with an agreed solution which is the product of private negotiation and compromise. Although of course the facts are analysed in depth by the court, this is largely for the purpose of considering the criteria applicable to DPAs under the Crime and Courts Act 2013

and various SFO policies, rather than the operative elements of the underlying offences. This has led to a lack of significant jurisprudence about the Act itself.

7.5 There are other potential costs. It is notable that, so far, no individual connected to a published DPA has been prosecuted, although we believe there have been charges in certain cases. It is notable that, in the US, the use of DPAs is very common but the individual prosecution-rate arising from these cases is lower than might be expected. Of course, this may well be a price worth paying. DPAs are seen as the optimal means of balancing various policy objectives notably incentivising better ethics and governance while also allowing for at least some punishment of corporate wrongdoing.

Used appropriately and consistently?

7.6 Only four DPAs have been agreed so far and only three in relation to Bribery Act offences so it is difficult to draw any meaningful conclusions. It is difficult to judge whether DPAs have been used appropriately without information about non-DPA dispositions during the relevant period. That said, it is at least somewhat encouraging that DPA dispositions are published and can be analysed.

7.7 There are some differences in how DPAs have been applied which call into question the consistency of the approach of prosecutors. These indicate that there is an element of pragmatism, realism and negotiation in the use of DPAs, for example in the determination of compensation, the calculation of disgorgement, the discount on the financial penalty, the application of aggravating and mitigating factors and the totality principle.

7.8 The approach of prosecutors to self-reporting and cooperation has varied. For example, the SFO had begun investigating Rolls-Royce independently prior to any contact with the company, so that the matter did not stem from a self-report. During the investigation Rolls Royce plainly did cooperate with the SFO and reported additional wrong-doing. Former SFO Director Sir David Green stated that *"exemplary cooperation put Rolls-Royce in the same position as a company that has self-reported"*.

7.9 By contrast, in the recent *Skansen Interiors* case the CPS chose to prosecute the company despite the fact that it had self-reported by way of a suspicious activity report with the National Crime Agency, and had also reported the suspected bribery to the City of London police.

7.10 DPAs are likely to be more easily applied to larger businesses. Smaller enterprises, such as Skansen, are less likely to have the resources or longer-term enterprise value to be able to cooperate with authorities and/or to change their leadership to the same extent. Nor will they carry the economic weight of a Rolls Royce or the concomitant impact of a prosecution on third parties.

Effect on likelihood of prosecution of culpable individuals?

7.11 DPAs are only available to corporates which cooperate, cooperation being said to include assistance as regards the potential prosecution of individuals. It follows that DPAs are apparently expected to increase the likelihood that culpable individuals will be prosecuted.

7.12 However, as outlined above, although we believe charges have been laid, no prosecutions have emerged out of DPA cases so far.

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?

Comparison with Legislation Elsewhere

8.1 In our view, the best available comparative work on the effectiveness of national anti-bribery laws, as least as regards the bribery of foreign public officials, is that produced by the OECD Working Group on Bribery.

8.2 As practitioners in England and Wales we recognise our inherent bias towards the familiar. However, it is clear that many overseas lawyers and commentators admire the Bribery Act because, among other things:

- It offers a recognisable definition of bribery;
- It applies a less taxing standard as to the mental element in relation to the bribery of foreign public officials;
- It applies both to "private to private" and "private to public" bribery;
- It does not make exception for facilitation payments, such an exception being notoriously hard to define and rarely, if ever, relied upon in litigated matters;
- It at least attempts to provide an incentive towards good governance by means of the "failure to prevent" offence and the defence of adequate procedures.

8.3 The main lesson which might be learned from other countries is that predictable enforcement is the key to the effectiveness of any criminal legislation. The effectiveness of the US Foreign Corrupt Practices Act ("FCPA") for example derives largely from the way it has been enforced by the US authorities rather than the terms of the legislation itself (which are not always easy to interpret).

8.4 Other distinguishing features of the Bribery Act include its broad extra-territorial reach and the strict liability corporate offence of failing to prevent bribery.

8.5 *Extra-territorial jurisdiction:* Prior to the Bribery Act, the FCPA was considered by many to be the legislation with the widest reach. However, under Section 7 of the Act, a company incorporated or carrying on business in the UK may be liable for conduct of an 'associated person', wherever that associated person is located. For all other offences under the Bribery

Act, the courts have jurisdiction over offences committed outside of the UK where the individual concerned has a 'close connection with the UK' (section 12). This extra-territorial reach is broader than that of the FCPA. Canada has also (since 2013) had jurisdiction over offences committed anywhere in the world by a Canadian citizen, resident or company and jurisdiction over foreign companies and individuals may be established pursuant to a test of a 'real and substantial connection' with Canada.

8.6 *Knowledge, intent and Corporate Liability:* Section 7 of the Bribery Act is a strict liability offence: knowledge of the bribe by the commercial organisation is not a requirement. The only defence is that the organisation had in place 'adequate procedures' designed to prevent incidences of corruption.

8.7 *Bribery of Private Persons and/or Public Officials:* The Bribery Act goes further than the FCPA as it outlaws bribery of private persons. It goes further than the FCPA in relation to the bribery of a public official in that it does not require an intention that that person will improperly perform his duties, nor does the payment need to be made corruptly[2]. However, under the Bribery Act a 'foreign public official' is defined more narrowly than under the FCPA.

8.8 *Facilitation Payments:* Whilst the US courts have held that a defendant may raise an economic coercion defence for small facilitation payments, these are illegal under the Bribery Act no matter how small or routine or expected by local customs these may be. In general, the German, French and Canadian legislation (as amended and in force since October 2017) also extends the offence to all forms of gifts, gratuities and invitations that the recipient is perceived to benefit from.

Lessons which could be learned from other countries

8.9 In our view, the Bribery Act compares favourably with anti-corruption legislation in most other countries. Any lessons to be learned are more in the field of investigation and enforcement of the law, including in relation to the use of DPAs, which have been used extensively in the US for well over 20 years.

9. WHAT IMPACT HAS THE BRIBERY ACT 2010 HAD ON UK BUSINESSES AND INDIVIDUALS OPERATING ABROAD?

9.1 Again, this is a very broad question which would benefit from detailed scholarly analysis, for example by an international organisation or a trade body.

9.2 As lawyers in private practice our experience has been that our corporate clients, especially those based in the UK, tend to be aware of the Bribery Act and bribery risk when doing business abroad. Anecdotally, it is apparent that there is greater caution among clients, especially in head-office functions, as regards such activities as gift-giving or corporate

[2] The 6(3)(b) exception regarding foreign laws permitting influencing of an official is unlikely to be relevant to most cases.

hospitality overseas. It is now also quite normal for businesses to carry out due-diligence checks on intermediaries. Intermediaries themselves have become more sophisticated and responsive to the demands of international companies.

9.3 As mentioned above, we have occasionally encountered businesses which weigh up the reputational and legal risks of bribery when making decisions as to whether or how to invest or operate in particular countries or whether to bid for particular contracts. However, we are not aware of an obviously inappropriate degree of risk-aversion as a result of the Bribery Act. Companies with major operations in high-risk territories seem more inclined to improve systems and controls rather than abandon investments or market opportunities in difficult markets. This may change if there is a feeling that such companies are being unfairly targeted in relation to minor infractions, i.e. that law-enforcement activity is disproportionate.

9.4 It is more difficult to estimate the effect on individuals. In our view, the existence or terms of the Bribery Act are likely to have had a meaningful effect on individuals temporarily doing business abroad but ultimately based in or domiciled in the UK. The effect on people domiciled abroad with fewer long-term ties to the UK may be less. There remains the archetype of the ex-pat of thirty years who is far from bashful about bribery as being "how things are done" and "part of the culture".

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