Global Witness Submission to the Joint Scrutiny Committee on the UK Draft Bribery Bill

Introduction

Global Witness is an NGO that exposes the corrupt exploitation of natural resources and international trade systems. We obtain evidence which we use to drive campaigns that end impunity, resource-linked conflict, and human rights and environmental abuses. Global Witness was co-nominated for the 2003 Nobel Peace Prize for its work on conflict diamonds. We welcome the opportunity to comment on the UK Draft Bribery Bill.

We have carried out numerous investigations concerning allegations of bribery and corruption on the part of companies or public officials around the world, whose findings we make public in our reports. Our work has given us a detailed understanding of the anti-corruption laws of different countries and of the practices of corporations in respect to bribery and corruption.

Bribery, particularly the bribery of foreign public officials, by multinational companies, is prevalent in many developing countries, including countries rich in natural resources where our work is concentrated. Bribery undermines the rule of law and the principle of fair competition and entrenches bad governance in such countries, hindering their efforts to alleviate poverty and often contributing to instability and human rights abuses.

Bribery can lead directly to human suffering and death, for example where it results in government contracts being awarded to companies that perform substandard construction work or provide substandard goods and services in the health sector. Bribery of foreign officials can help to entrench corrupt elites by providing the incentive and the means to maintain a tight grip on power, particularly in natural resource rich states where the stakes and potential rewards are higher.

Thus bribery is not a victimless crime or a regrettable but unavoidable cost of business for companies overseas. It is a morally poisonous and economically destructive crime which contributes, directly and indirectly, to poverty and human suffering.

We strongly believe that the UK has an obligation to ensure that companies based here do not contribute to corruption in foreign countries through bribery, or other means, and we welcome the commitment on the part of this government to tackling this issue.

Furthermore, as a signatory to both the *UN Convention against Corruption* and the *OECD Convention on Combating Bribery*, the UK Government has an international duty to ensure that these crimes are adequately investigated and prosecuted. Past evaluations indicate that the UK Government has failed to fulfil this obligation thus far and have questioned the government's commitment to doing so.[1]

The Bill is an important step towards tackling bribery by UK companies, however more must be done to ensure that companies that facilitate and/or engage in high-level corruption are formally investigated and held to account in UK courts. We note with disappointment that the current Bill does not address broader concerns relating to UK companies' relationship to corruption around the world or provide additional resources for enforcement agencies and prosecutors.

We broadly support the introduction of a Bill and commend a number of its clauses. However, we are concerned that the Bill may not be effectively implemented without further changes. As such our submission is split into 2 sections. The first section is a series of positive endorsements of the provisions in the Bill which we hope will remain in the final version. The second section outlines our concerns about its inadequacies and makes recommendations for improvements.

Section 1 – Positive developments relating to the Bill.

We acknowledge that the language of the Bill, for example in its definition of the offence of bribery, does bring the UK largely in line with its obligations under the OECD Guidelines on Combating Bribery and modernises the crimes of corruption and bribery in the UK. We also commend the following points made in the Bill

1.1. The broad definition of bribery as set out in Sections 1 and 2. The definition of a bribe as "a financial or other advantage" is broad and should, if properly applied, make it harder for companies to circumvent the law by paying bribes in forms other than cash payments, for example; payments in kind.

1.2. The inclusion of third parties within the remit of the Bill; Section 1(4) and 1(5). The fact that the Bill prohibits bribery of, or via, third parties, not just direct payments to foreign public officials by the person paying the bribe. The act of bribery should therefore cover bribes paid to relatives and close associates of foreign officials, not just the officials themselves. This is a crucially important provision because it would otherwise be easy for companies to circumvent the law by ensuring that bribes are not paid directly to foreign public officials but to their relatives or associates.

1.3. The broad definition of the function or activity to which a bribe relates as described in Section 3.

[1] Joint Statement, Call for UK Government Action on Bribery located at http://www.thecornerhouse.org.uk/item.shtml?x=369017 (last accessed 17 June 2009)

1.4. The inclusion of Section 4 – 'Bribery of foreign public officials' which we believe to be of particular importance in tackling corruption and poverty in areas of high level corruption and commodity fuelled conflict. We also welcome the broad definition of foreign public official in this context.

1.5. The clarification in Section 7 that offences under sections 1, 2 and 4 will apply on an extra-territorial basis.

1.6. The inclusion of Section 5 –which should give companies an incentive to prevent bribery on the part of their employees. We see this as an essential component in stopping the practice of bribery.

1.7. The defence available under Section 5 - 'Failure of commercial organisations to prevent bribery', that payments to foreign public officials have to be allowed or required by the foreign country's law in order to be deemed legitimate. This is an important point because it should prevent payers or recipients of bribes from attempting to justify them by the claim that such payments are customary or acceptable within the culture of the foreign country concerned.

On this basis we welcome the introduction of the draft Bill and we call on the government to provide a timetable for the Bill's passage through parliament which will see the Bill passed in the next parliamentary session. However, we do have a number of concerns and recommendations which we would like to see taken into account.

Section 2 – Inadequacies relating to the Bill

Our overriding concern relates to the weakness of the provisions included under Section 5 – 'Failure of commercial organisations to prevent bribery'. Although the creation of this offence is welcome and vitally important in principle, we are concerned that as drafted, the Bill will not lead to significant numbers of prosecutions under this offence and thus will fail to be an effective deterrent to corporate bribery.

Our concerns predominantly fall into three areas.

1) The lack of clear reference or clear application to subsidiaries of UK companies. Our concern is that this will allow companies to circumvent the law by using their foreign subsidiaries to pay bribes, thus defeating the spirit and purpose of the law.
2) Section 5: The lack of sufficient obligation and accountability on the part of companies, and individuals within the companies, specifically senior corporate officer, to actively record and actively provide i) information that proves that 'adequate' measures were in place to prevent bribery, and ii) evidence of any payment of bribes associated with the company. Without active obligations on companies the Bill lacks teeth. Multinational companies typically employ a variety of measures against bribery by their employees, including codes of conduct, internal training and compliance monitors. Such measures might be deemed "adequate" on paper but in practice we have seen significant cases where

such measures have failed to prevent bribery as a matter of de-facto corporate policy. We would be happy to provide specific evidence of such cases, if it is useful. We believe that a greater onus and responsibility to self-monitor, record and report any suspicious activity must be placed on a senior corporate officer to ensure the successful application of the law.

3) The lack of additional resources for the enforcement of the legislation. According to the impact assessment for implementation stage, under the legislation proposed in the Bill, there is likely to only be 1.3 additional prosecutions a year which suggests that the Bill will not act as a successful deterrent. Only properly enforced legislation will successfully disincentivise bribery. The notion that bribery is not a problem for UK businesses is challenged by recent research by international law firm Freshfields Bruckhaus Deringer, which shows that 16 out of 29 investigations currently being conducted by the US government into corporate bribery outside the US are focused on companies based in the UK, Bermuda or the Cayman Islands. We find it deeply disturbing that a foreign government is investigating allegations of corruption by British companies, while Britain is not: this amply demonstrates the need for enforcement of the new law to be adequately resourced.

Our concerns are further elaborated below.

Section 5 - 'Failure of commercial organisations to prevent bribery'

a. As per 2) above. Under Section 5 – 'Failure of commercial organisations to prevent bribery' there is no equivalent to the "books and records" provisions of the *Foreign Corruption Practices Act* FCPA in the United States, which make it an offence for a company not to keep accurate records of its payments. There is therefore an insufficient onus on the company itself to uncover corruption on the part of its employees and disclose it to the authorities. In the U.S. system self-reporting by companies is a major source of FCPA cases and usually earns more lenient treatment for the company concerned hence providing an incentive to act. It is our firm opinion that a robust obligation must be placed on companies and its senior corporate officers to demonstrate that they have kept accurate records of their payments with the specific aim of preventing bribery by their employees.

b. Particular concern arises with respect to the interplay between Section 5(4) and Section 5(5) such that the implication will be that the responsibility for implementing 'adequate procedures' to prevent persons from committing bribery will be designed to middle management and not to directors, managers, secretary or other similar level officer in the company. Alternatively, Global Witness recommends that the text of sub-section (5) be modified to reflect that a senior corporate officer will be responsible for ensuring that adequate procedures are in place. This will have the double effect of (i) ensuring that adequate procedures are, in fact, put into place, and (ii) ensuring that the defense of adequate procedures is not abused. In the U.S. the Sarbanes-Oxley requirements require company executives to confirm that the company's records are accurate It is vital

that under the provisions of the Bill senior executives are liable for ensuring that rigorous and adequate procedures are in place to prevent bribery occurring within their organisations.

c. According to the notes accompanying the Bill (98): "The corporate offence is not regulatory in nature and there will be no monitoring of compliance." So there is no obligation on companies to report bribes by their employees and no onus on the authorities to monitor whether or not companies' anti-bribery mechanisms are "adequate" or not. Once again it seems that there is little incentive for compliance.

Additional resources and potential prosecutions

a. As per 3) above. According to the notes, the government believes that there will only be "a small number of additional prosecutions a year arising from the introduction of the new corporate offence" (note 94)". We are dismayed that the government appears to have decided, a priori, that the new law will not significantly affect a dismal record of anti-corruption enforcement which has been condemned in detail by the OECD, and which the new law is itself supposed to redress. As previously mentioned, in 2005, the OECD Working Group on Bribery criticized the UK Government's lack of prosecutions for bribery.[2]

b. This view has an alarmingly self-defeating quality. The corporate offence rests entirely on the premise that a fear of prosecution might lead companies to tighten their anti-corruption measures, but the government itself appears to believe (and is stating quite publicly to all those who read the draft bill and its notes) that there will not be more than a handful of prosecutions. We contrast this to the United States where anecdotal evidence suggests that U.S. companies *do* fear the FCPA, because they are quite aware that investigation and huge fines are a real possibility. The effectiveness of law often lies in its deterrent effect. Without real threat of prosecution, when weighed against the financial incentive for bribery of foreign officials, companies will continue to pay bribes.

c. Given that there is insufficient onus on companies to report bribery, and given that the government envisages little in the way of extra resources for prosecutors to investigate, then the two most likely routes for bribery cases to emerge are from corporate whistleblowers or investigative reporting. We know from our own experience that it is almost impossible for investigative reporters to obtain evidence of bribery because financial transactions through the banking system are, by their nature, secret. We also know from our work that banks cannot be relied on to spot and report on potentially corrupt transactions. This leaves only corporate whistleblowers. In the absence of any incentives for whistleblowers to come forward, it seems unlikely that the Bill will have any tangible effect on the payment of bribes to foreign officials. The hope that individuals within companies will choose to come forward is an alarmingly thin basis for the application of a

[2] http://www.oecd.org/dataoecd/62/32/34599062.pdf (last accessed on 17 June 2009).

law that is supposed to demonstrate Britain's commitment to fighting corporate bribery.

d. We believe it is vitally important for the credibility and reputation of the British government and British business that this Bill and its implementation be seen as a serious deterrent to corruption. This is why we are at the same time encouraged by the fact of this Bill, and impressed by some of its elements, while remaining deeply worried about whether it can achieve its stated purpose.

We have a genuine concern that the flaws in the current Bill will seriously undermine its effectiveness. We would therefore strongly encourage the Joint Scrutiny Committee to reflect our concerns in their recommendations on the Bill. We hope that these recommendations will be reflected in a final draft of the Bill and in the UK's broader anti-corruption strategy. We very much hope that a final draft of the Bill will be presented to Parliament with a time table to pass before early next year.