

**RESPONSE TO THE HOUSE OF LORDS SELECT COMMITTEE ON THE BRIBERY ACT
2010 PUBLISHED ON 20 JUNE 2018**

The Fraud Advisory Panel welcomes the opportunity to comment on the *Call for Evidence* published by the House of Lords Select Committee on the Bribery Act 2010 on 20 June 2018, a copy of which is available from this [link](#).

This response of 31 July 2018 reflects consultation with the Fraud Advisory Panel's board of trustees and interested members. We are happy to discuss any aspect of our comments and to take part in all further consultations on the issues we've highlighted or to provide evidence to the committee.

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The Fraud Advisory Panel (the 'Panel') is the UK's leading anti-fraud charity.

Established in 1998 we bring together fraud professionals to improve fraud resilience across society and around the world.

We provide practical support to almost 300 corporate and individual members drawn from the public, private and voluntary sectors and many different professions. All are united by a common concern about fraud and a shared determination to do something about it.

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INTRODUCTION

1. The Fraud Advisory Panel believes that the Bribery Act 2010 has the potential to make to a significant difference to the UK's ability to tackle bribery and corruption both domestically and abroad and is a huge improvement on the previous legislation.
2. However, fraud, bribery and corruption have traditionally been afforded a low priority by the criminal justice system and have consequently suffered from a lack of proper investment in resources (in terms of both money and people). Only recently have national crime statistics begun to include data on fraud and cybercrime¹, and no similar data is routinely collected and published on bribery and corruption. In our view there is a need for greater transparency in, and monitoring of, criminal justice outcomes in relation to bribery and corruption including the number of cases being reported to, and investigated by, law enforcement and coming before the courts (and what the outcomes are). Only then will we be able to properly assess the impact that the Act has had on deterring bribery and corruption.

RESPONSES TO SPECIFIC QUESTIONS

A. DETERRENCE

Q1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

3. The Fraud Advisory Panel believes that the Bribery Act is an important piece of legislation that has improved the prospects of both stopping bribery and corruption before it happens and uncovering it when it has, whilst also leading to increased self-reporting of criminality to the authorities.
4. The Act seems to have had a positive effect in discouraging some UK companies – especially big business such as genuine trading companies, banks and household names which trade around the world – from engaging in bribery. These companies have invested significantly in anti-bribery and corruption compliance and introduced better systems and controls to prevent bribery in the UK and in other jurisdictions.
5. However we caution that it is still too early to fully assess the effectiveness the legislation and its impact as a deterrent. So far the Act has not led to a significant increase in the number of corporate or individual cases being prosecuted by the Serious Fraud Office (SFO)². Indeed, very few cases have been brought under the Act, and The majority brought against corporates have been settled with a Deferred Prosecution Agreement (DPA).

¹ Office for National Statistics (19 July 2018). *Crime in England and Wales: year ending March 2018*. See Chapter 9 'Little change in the volume of fraud offences in the last year'. <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2018#little-change-in-the-volume-of-fraud-offences-in-the-last-year>

² Between July 2011 and December 2017 16/59 bribery and corruption cases were completed in the UK under the Bribery Act 2010. Some of the 59 cases involved criminal conduct committed prior to 1 July 2011 and would have been assessed under the previous bribery regime. For more information see EY (March 2018). *UK Bribery Digest: table of cases* [https://www.ey.com/Publication/vwLUAssets/EY-UK-Bribery-Digest-edition-12-March-2018-table-of-cases/\\$FILE/EY-UK-Bribery-Digest-edition-12-March-2018-table-of-cases.pdf](https://www.ey.com/Publication/vwLUAssets/EY-UK-Bribery-Digest-edition-12-March-2018-table-of-cases/$FILE/EY-UK-Bribery-Digest-edition-12-March-2018-table-of-cases.pdf)

6. The Act will clearly not be a deterrent for those who will always be minded to commit a criminal offence or to run the risk of being caught (such as a rogue director or employee), especially if the rewards are great enough and the chances of detection low.

B. ENFORCEMENT

Q2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

7. It is still too early to tell whether the Bribery Act 2010 is being adequately enforced because most cases date back several, or even many, years. However, our general impression is that it is not. The number of enforcement actions taken under the Act are low and have likely been hindered by the ongoing uncertainty surrounding the SFO's future³, a lack of adequate resources being made available to authorities, and the disruption caused by the transfer of law enforcement responsibilities for investigating overseas corruption to the National Crime Agency's International Corruption Unit, now part of the Economic Crime Command (ECC).⁴ We hope that the ECC will be more effective in combating bribery and corruption than its predecessor.
8. More clarity is needed about the agencies responsible for investigating cases of low and mid-level bribery which fall outside the SFO's remit. These agencies also need to be provided with proper training and resources to fulfil their responsibilities. Currently it is clear that cases falling outside of the SFO's remit, such as those involving small-scale facilitation payments and/or low level bribery and corruption against domestic companies and local authorities, are a hidden problem, left largely uninvestigated and unpunished. Yet reducing public sector corruption (particularly in public procurement and grants) is a stated priority for Government under its anti-corruption strategy.⁵
9. It follows, therefore, that we believe there needs to be more investigation and more enforcement so that the public as well as global business know that the UK is serious about changing business behaviour, both nationally and internationally, within both the private and public sectors. Greater resources need to be made available for intelligence, investigative and prosecutorial purposes to ensure that the SFO and CPS are able to bring and sustain cases beyond reasonable doubt.
10. There will always be competition for investigation and prosecution and resource from other criminal offences, many of which may seem as more of a priority for police forces and the public. However, it is vital that bribery is seen as a significant problem worthy of law enforcement.

³ Alexandra Rogers (2018). Uncertainty around SFO's future 'is over', says departing director David Green. *City A.M.* (13 April). <http://www.cityam.com/283919/uncertainty-around-sfos-future-over-says-departing-director>. Christopher Williams (2017). Theresa May abandons plans to scrap fraud office. *The Telegraph* (16 September). <https://www.telegraph.co.uk/business/2017/09/16/theresa-may-abandons-plans-scrap-fraud-office/> Natasha Bernal (2017). Future of SFO investigations in question amid Theresa May pledge. *The Lawyer* (18 May). <https://www.thelawyer.com/issues/online-may-2017/future-sfo-investigations-question-amid-theresa-may-pledge/>

⁴ National Crime Agency (2018). International Corruption Unit (ICU). [Website] <http://nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/international-corruption-unit-icu>

⁵ HM Government (2017). *UK anti-corruption strategy 2017-2022*. <https://www.gov.uk/government/publications/uk-anti-corruption-strategy-2017-to-2022>

C. GUIDANCE

- Q3. 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?**
11. We question whether you can ever have guidance that is comprehensive enough to cover every company, every risk and every circumstance. Attempting to do so would create a lengthy and unworkable set of guidance, so a balance must be struck.
 12. Many SMEs (and their advisors) are still confused by the concept of 'adequate procedures' and how these can be practically achieved. This confusion may deter some companies from implementing and investing properly in anti-bribery measures and therefore have the opposite effect to the Act being a deterrent. Less than half of SMEs surveyed in 2014 said that they had put in place any bribery prevention procedures and the mean spend amongst those that had was only around £2,730.⁶ Where SMEs have implemented a bribery policy, we are concerned that they do not have the time or resources to reinforce the purpose and scope of the policy year-on-year.
 13. The official guidance is well-supplemented by other non-official guidance published by professional advisers working in this space, but the sheer volume of such material may be too burdensome for some SMEs to fully consider. Therefore there is potential scope for more to be done to educate smaller businesses about adequate procedures in a simple and more easily digestible format.
 14. Improved outreach, dialogue and co-operation with the business community (by the SFO, NCA and others) would enable grey or potential problem areas to be identified and discussed before court proceedings are instigated. We believe that encouraging such dialogue and cooperation is likely to encourage companies to come forward when uncovering suspected bribery. We believe this process would be assisted by a consistent approach from investigation and prosecution agencies. There are concerns that the prosecution of Skansen was not in line with the approach taken by the SFO in Rolls Royce and other cases.

D. CHALLENGES

- Q4. 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?**
15. Since the introduction of the Act there has been a marked increase in awareness of the criminal offence of bribery, especially amongst big business, professional advisers, and those working in compliance and risk-related roles. Initially, however, business may have focussed too much on hospitality-related risks rather than those risks associated with third parties (such as introducers and government officials) which are more significant.

⁶ HM Government (2015). Insight into awareness and impact of the Bribery Act 2010 among small and medium sized enterprises (SMEs). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

16. The challenges to businesses in complying with the legislation and its impact on businesses operating abroad are great. On the one hand they must comply with the law and guidance⁷ and on the other there are cultural differences as well as legal differences around the world in terms of what is considered a gift or a bribe and what is 'expected' in a particular country or network in order to conduct business.
 17. Some companies have significantly improved and invested in their anti-bribery policies and procedures. However it has been seen that commercial interests may still override bribery concerns, particularly where competitors in the same market overseas are not from jurisdictions where corporate bribery is effectively enforced. Similarly, facilitation payments pose particular issues given the reality of businesses operating overseas in jurisdictions with lower standards. A business is often faced with the choice of either withdrawing from the jurisdiction in order to comply with the legislation or continuing to operate and succumbing to paying bribes. This can be particularly problematic for humanitarian and international aid charities. In comparison the USA's facilitation payment exemption provides a safe harbour for certain types of payments. Further guidance on facilitation payments, especially those made under duress or at risk of life and limb, would be welcome.
 18. It follows that we believe that Government should do more not only to support UK businesses who seek to trade overseas, but also, more importantly, to challenge countries which have not taken sufficient and appropriate action against bribery (particularly in relation to corrupt foreign officials). As part of its anti-corruption strategy to work with other countries to combat corruption, the Government (working with other governments, the World Bank, and other lending organisations) needs to start focusing on the 'demand' side of bribery and force other governments to tackle their own corrupt officials, in order to improve anti-bribery standards worldwide.
 19. Finally, we note that public interest has waned somewhat since the Act was introduced because of its lower public profile and lack of learning points to emerge from cases to date. The government, through supervisory authorities, should consider ways to ensure awareness is maintained.
- Q5. What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?**
20. It can be very difficult and expensive for smaller businesses to implement 'gold-plated' bribery procedures because of the challenges associated with determining what constitutes 'adequate'. In part due to the lack of continued education of SMEs in relation to bribery and corruption risks, many such companies do not appreciate that those risks also exist for companies trading within the UK alone, as evidenced in the Skansen Interiors Ltd case. Some SMEs also believe that they are unlikely to be prosecuted due to their size and the perceived limited prosecution resources.

⁷ This includes HMG guidance such as DFID's Global Britain Strategy, Business Integrity Initiative, and new anti-corruption and human rights wording developed by IBLF Global and GovRisk as uploaded last month to great.gov.uk – the UK Government's platform for international trade and investment information and services.

Q6. Is the Act having unintended consequences?

21. As stated above, there are massive challenges for UK businesses that operate in high-risk countries, particularly where competition is from businesses whose countries of origin are not so law-abiding.
22. Bribery is endemic in many parts of the world. There is a risk that UK and other western countries will cease trading in high-risk jurisdictions, leaving the field open to organised crime and bad practice. The Government could do more to encourage such jurisdictions to raise their standards to acceptable levels.

E. DEFERRED PROSECUTION AGREEMENTS

Q7. Has the introduction of Deterred 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?

23. DPAs are an important mechanism to punish corporate wrongdoing and we, therefore, consider their introduction to be a positive development and a welcome tool in the prosecutors toolkit. They are a particularly good option for companies which come forward to self-report but should be used sparingly where this is not the case and wrongdoing has been covered up.
24. Some of the advantages of DPAs are the cost savings to the public purse (achieved through shorter investigations and less lengthy court cases and enforcement actions), and that they provide a greater incentive for companies to self-report because the stigma of conviction has been removed. For these reasons there is merit in DPAs becoming the default mechanism for all but the most serious cases in future.
25. Case law in this area is still very much in its infancy. As it develops it should provide greater clarity to companies and their professional advisers on what constitutes adequate procedures and help them to make informed decisions about self-reporting.
26. We note that some concerns have been raised about the transparency of justice and equality before the law (ie. they may be seen by some as 'cosy deals' or being politically-driven). They may also be seen as a cheap solution for the offending company and an easy option for the prosecutor. In reality they are not. Unlike the US Foreign Corrupt Practices Act (where parties can reach agreement without any significant intervention by the judge) the judge has to play an active and critical role in approving DPAs under the Crime and Courts Act 2013.
27. It is of course based on a small sample of four cases, but so far the DPAs reached have been consistent and subject to appropriate scrutiny by the judiciary. It should also be noted that in two cases, Sweett and Barclays, DPAs were declined by the SFO due to a lack of apparent cooperation by the companies.
28. It is difficult to assess whether DPAs have reduced the likelihood of culpable individuals being prosecuted for offences, as it is not known whether cases against individuals were investigated or declined in every case. It is however clear that a DPA can be followed by action against individuals, as illustrated by the Rolls-Royce case.

F. INTERNATIONAL ASPECTS

Q8. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

29. In our opinion the Bribery Act 2010 compares well with other anti-corruption legislation and is widely regarded as the strictest currently in existence. . However this means nothing without timely investigation and enforcement. In this regard the UK could learn and benefit from the US experience whereby sufficient resource is dedicated to investigative and prosecution agencies, working together with the SEC, to result in a more joined-up and effective approach. There are also greater incentives to self-report in the US because of their whistleblowing regime and the severity of financial penalties that can otherwise be imposed⁸. It could be beneficial to assess the effectiveness of these measures and to consider whether it is desirable to revisit the debate about the incentivisation and protection of UK whistleblowers.

Q9. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

30. Please see our above responses.

⁸ In 2017 11 companies paid just over US\$1.92bn to resolve FCPA enforcement cases. See Richard L Cassin (2010). 2017 FCPA enforcement index. *FCA Blog* [2 January]. <http://www.fcpablog.com/blog/2018/1/2/2017-fcpa-enforcement-index.html>