



HOUSE OF LORDS

Select Committee on the Constitution

1st Report of Session 2009–10

Clause 12 of the Bribery Bill

Report

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Clause 12 of the Bribery Bill

1. The Constitution Committee is appointed “to examine the constitutional implications of all public Bills coming before the House; and to keep under review the operation of the constitution”. In carrying out the former function, we endeavour to identify questions of principle that arise from proposed legislation and which affect a principal part of the constitution. **This report draws to the attention of the House clause 12 of the Bribery Bill.**
2. The Bribery Bill was introduced into the House of Lords on 19 November 2009. The second reading debate on the Bill is scheduled to take place on 9 December. The Bill was preceded by a Draft Bill¹ which was scrutinised in detail by a Joint Committee of both Houses of Parliament.² The Government’s response to the report of the Joint Committee was published on 20 November.³
3. The chief purpose of the Bribery Bill is to reform the criminal law of bribery to provide for a new consolidated framework of bribery offences to cover bribery both in the UK and abroad. Clauses 1 and 2 replace the existing offences at common law and under a range of statutes with two new general offences based on an intention to induce improper conduct: bribing another person—the offering, promising or giving of an advantage; and being bribed—requesting, agreeing to receive or accepting of an advantage. Clause 6 creates a separate offence of bribery of a foreign public official. Clause 7 creates an offence of failure of commercial organisations to prevent bribery.
4. It may be that in due course the Constitution Committee will wish to report to the House on further aspects of the Bill: a number of the Bill’s provisions may be argued to raise matters of constitutional importance. For the time being, however, our attention is focused on clause 12 of the Bill. We wish to draw this clause to the attention of the House at this stage of the Bill’s proceedings not only because of the constitutional concerns it raises, but also because it is drafted in a way which is notably different from the corresponding clauses in the Draft Bribery Bill.
5. Clause 12 (1) is drafted in the following terms:

12 Defence for certain bribery offences: legitimate purposes

- (1) It is a defence for a person charged with a relevant bribery offence to prove that the person’s conduct was necessary for—
 - (a) the prevention, detection or investigation by, or on behalf of, a law enforcement agency of serious crime,
 - (b) the proper exercise of any function of the Security Service, the Secret Intelligence Service or GCHQ, or
 - (c) the proper exercise of any function of the armed forces when engaged on active service.

¹ Cm 7570, March 2009.

² Joint Committee on the Draft Bribery Bill, 1st Report (2008–09), HL 115.

³ Cm 7748, November 2009.

6. In the Appendix we set out the full text of clause 12 of the Bill and the corresponding clauses of the Draft Bill, clauses 13–14.
7. The Joint Committee on the Draft Bill recommended that clauses 13 and 14 be removed. The Committee stated that it had heard “no persuasive evidence of a need for the domestic intelligence services to be granted an authorisation to bribe”, and noted longstanding concerns as to whether a provision such as clause 13 complies with the United Kingdom’s international treaty obligations.⁴ In its response to the Joint Committee’s Report, the Government flatly re-iterated that it is “satisfied that some provision is required in the Bribery Bill to address those circumstances in which the intelligence services may have to use financial or other inducements to carry out their relevant statutory functions”, without furnishing anything more in terms of reasons or evidence.⁵
8. It is to be noted that clause 12 of the Bill as introduced is markedly different from clauses 13–14 of the Draft Bill. The scheme for ministerial authorisation has been abandoned in favour of a series of blanket defences. **The removal in the Bill of the safeguard of there being a Minister responsible is, of itself, a matter of constitutional concern.**
9. Our concerns, however, go deeper than this. **The defences provided for in clause 12(1)(a) and (b) are drawn too widely, in three separate respects.** (We raise no objection to the defence in clause 12(1)(c).)
10. First, the defence applies to “any function” of the Security Service, the Secret Intelligence Service, and GCHQ. While we can see that there may be a case for such a defence in the context of the Security and Secret Intelligence Services’ statutory functions in connection with national security and with the prevention and detection of serious crime, **it is not self-evident that such a defence should extend also to the Services’ statutory function “to safeguard the economic well-being of the United Kingdom”.**⁶
11. Secondly, the defence applies equally to the Security Service, the Secret Intelligence Service, and GCHQ. While, again, we can see that there may be a case for such a defence in the context of the Security and Secret Intelligence Services’ functions with regard to national security and serious crime, **it is not self-evident that GCHQ requires the same statutory protection from the law of bribery. Unless compelling evidence is produced as to why there is such a need, clause 12(1)(b) should be amended so as to limit the scope of the defence.**
12. Thirdly, the defence applies not only to the security and intelligence services, but also to all other law enforcement agencies and to those persons acting on their behalf. This goes very much wider than would have been the case under the Draft Bill. Law enforcement agencies include not only the police, but also HM Revenue and Customs and the UK Borders Agency, as well as local authority trading standards and environmental health officers. Under clause 12 as currently drafted it will be lawful for any of these agencies to engage in bribery ‘if necessary’ for the purposes of preventing, detecting or investigating serious crime. “Serious crime” is defined to mean any offence

⁴ Joint Committee on the Draft Bribery Bill, 1st Report (2008–09), HL 115, para. 203.

⁵ Government Response to the Joint Committee on the Draft Bribery Bill, Cm 7748, p. 17.

⁶ See Security Service Act 1989, s. 1 and Intelligence Services Act 1994, s. 1.

punishable by three years' or more imprisonment, as well as any offence in which violence is used, any offence involving substantial financial gain, or any offence involving a large number of persons engaged in common purpose.⁷ **Drawing the defence in terms as wide as this jeopardises the constitutional principle of the rule of law. Unless compelling evidence is produced as to why clause 12(1)(a) is necessary in respect of each of the law enforcement agencies to which it may apply, it should be omitted.**

13. **Even in the event that compelling evidence is brought forward demonstrating a clear need for the defences in clause 12(1)(a) and clause 12(1)(b), the use of these defences should be made dependent upon prior authorisation. For the defence in clause 12(1)(a) such authorisation should be the responsibility of the Attorney General. For the defence in clause 12(1)(b) such authorisation should be the responsibility of the Secretary of State.**
14. **Clause 12(2) will require consequential amendment.**

⁷ By virtue of clause 12(2) giving "serious crime" the same definition as is found in the Regulation of Investigatory Powers Act 2000, s. 81(2) and (3).

APPENDIX

In this appendix we have set out clause 12 of the bill currently before Parliament and the corresponding clauses from the draft bill—clauses 13 and 14.

Clause 12 of the Bribery Bill

12 Defence for certain bribery offences: legitimate purposes

- (1) It is a defence for a person charged with a relevant bribery offence to prove that the person's conduct was necessary for—
- (a) the prevention, detection or investigation by, or on behalf of, a law enforcement agency of serious crime,
 - (b) the proper exercise of any function of the Security Service, the Secret Intelligence Service or GCHQ, or
 - (c) the proper exercise of any function of the armed forces when engaged on active service.

- (2) In this section—

“active service” means service in—

- (a) an action or operation against an enemy,
- (b) an operation outside the British Islands for the protection of life or property, or
- (c) the military occupation of a foreign country or territory,

“armed forces” means Her Majesty's forces (within the meaning of the Armed Forces Act 2006),

“detection”, in relation to serious crime, includes—

- (a) establishing by whom, for what purpose, by what means and generally in what circumstances any such crime was committed, and
- (b) the apprehension of the person by whom any such crime was committed,

“enemy” has the same meaning as in the Act of 2006,

“GCHQ” has the meaning given by section 3(3) of the Intelligence Services Act 1994,

“law enforcement agency” means a public authority acting in pursuance of a duty of a public nature under the law of any part of the United Kingdom to prevent, detect or investigate crime,

“public authority” has the same meaning as in section 6 of the Human Rights Act 1998,

“relevant bribery offence” means—

- (a) an offence under section 1 which would not also be an offence under section 6,
- (b) an offence under section 2,

- (c) an offence of attempting or conspiring to commit, or of inciting the commission of, an offence falling within paragraph (a) or (b), or
- (d) an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) in relation to an offence falling within paragraph (a) or (b),

“serious crime” has the same meaning as in the Regulation of Investigatory Powers Act 2000 (see section 81(2) and (3)).

Clauses 13 and 14 of the Draft Bill

The corresponding clauses of the draft Bill were 13 and 14 which are reproduced below—

13 Authorisations for intelligence services

- (1) Subsection (2) applies if, apart from that subsection, a person would commit a relevant bribery offence in doing an act or making an omission.
- (2) The person does not commit a relevant bribery offence if the act or omission done or made is authorised to be done or made by an authorisation of the Secretary of State.
- (3) The Secretary of State may give an authorisation under subsection (2) if, and only if, the Secretary of State is satisfied that conditions D to F are met.
- (4) Condition D is that—
 - (a) any acts or omissions which may be done or made in reliance on the authorisation will be necessary for the proper discharge of a function of the Security Service, the Secret Intelligence Service or GCHQ, or
 - (b) the operation in the course of which any such acts or omissions may be done or made will be necessary for the proper discharge of such a function.
- (5) Condition E is that there are satisfactory arrangements in force to secure—
 - (a) that no act or omission will be done or made in reliance on the authorisation beyond what is necessary for the proper discharge of a function of the Security Service, the Secret Intelligence Service or GCHQ, and
 - (b) that, in so far as any acts or omissions may be done or made in reliance on the authorisation, their nature and likely consequences will be reasonable, having regard to the purposes for which they are done or made.
- (6) Condition F is that—
 - (a) there are satisfactory arrangements in force under section 2(2)(a) of the Security Service Act 1989 (c. 5) and sections 2(2)(a) and 4(2)(a) of the Intelligence Services Act 1994 (c. 13) with respect to the disclosure of information obtained by virtue of this section, and
 - (b) any information obtained by virtue of an act or omission done or made in reliance on the authorisation will be subject to those arrangements.

- (7) An authorisation under subsection (2) may in particular—
- (a) relate to one or more specified acts or omissions, to acts or omissions of a specified description or to acts or omissions done or made in the course of a specified operation,
 - (b) be limited to one or more specified persons or to persons of a specified description,
 - (c) be subject to specified conditions.
- (8) In this section—
- “GCHQ” has the meaning given by section 3(3) of the Intelligence Services Act 1994 (c. 13),
- “relevant bribery offence” means—
- (a) an offence under section 1 which would not also be an offence under section 4,
 - (b) an offence under section 2,
 - (c) attempting or conspiring to commit an offence falling within paragraph (a) or (b),
 - (d) an offence under Part 2 of the Serious Crime Act 2007 (c. 27) (encouraging or assisting crime) in relation to an offence falling within paragraph (a) or (b), or
 - (e) aiding, abetting, counselling or procuring the commission of an offence falling within paragraph (a) or (b),
- “specified”, in relation to an authorisation, means specified in the authorisation.

14 Authorisations: supplementary

- (1) This section applies to an authorisation under section 13(2).
- (2) An authorisation may be given only under the hand of—
- (a) the Secretary of State, or
 - (b) a senior official.
- (3) But an authorisation may be given under the hand of a senior official only if—
- (a) the case is urgent,
 - (b) the Secretary of State has expressly authorised the giving of the authorisation, and
 - (c) a statement of that fact is endorsed on the authorisation.
- (4) An authorisation ceases to have effect—
- (a) at the end of the period of 6 months starting with the day on which it was given, if it was given under the hand of the Secretary of State, and
 - (b) at the end of the second working day after the day on which it was given, if it was given under the hand of a senior official.

- (5) Subsection (4) does not apply if the authorisation is renewed under subsection (6) before the day on which it would otherwise cease to have effect.
- (6) The Secretary of State may renew an authorisation for a period of 6 months starting on the day on which it would otherwise cease to have effect if, at any time before that day, the Secretary of State considers it necessary for the authorisation to continue to have effect for the purpose for which it was given.
- (7) Subsection (6) may apply more than once.
- (8) A renewal under subsection (6) must be made under the hand of the Secretary of State.
- (9) The Secretary of State must cancel an authorisation if the Secretary of State is satisfied that an act or omission authorised by virtue of it is no longer necessary.
- (10) In this section—
 - “senior official” has the meaning given by section 81 of the Regulation of Investigatory Powers Act 2000 (c. 23),
 - “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (c. 80) in any part of the United Kingdom.