



THE INSTITUTE
OF CHARTERED
ACCOUNTANTS
IN ENGLAND AND WALES

20 March 2008

Our ref: ICAEW Rep 36/08

Law Commission
Conquest House
37-38 John Street
Theobalds Road,
London, WC1N 2BQ

By email

Dear Mr Hughes

REFORMING BRIBERY

The Institute of Chartered Accountants in England and Wales is pleased to respond to your request for comments on your consultation paper no. 185 *Reforming Bribery*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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ICAEW Representation

ICAEW REP 36/08

REFORMING BRIBERY

Memorandum of comment submitted in March 2008 by the Institute of Chartered Accountants in England and Wales, in response to Law Commission consultation paper 185 “Reforming Bribery” published in October 2008

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INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales (the Institute) welcomes the opportunity to comment on the consultation paper *Reforming Bribery* published by the Law Commission in October 2007. We have not sought to respond to every aspect of the consultation, but where our responses relate to particular provisional proposals or questions for consultation we have tried to identify these by reference to the paragraph number where these are listed in Part 12 of the consultation.

WHO WE ARE

2. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 130,000 members in more than 140 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 700,000 members worldwide.
3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.

MAJOR POINTS

Support for the Project of Reform

4. The reform of the law of bribery in the UK is long overdue. The current law causes uncertainty over what is or is not acceptable, may not adequately comply with the UK's international obligations and has damaged the reputation of the UK. The Law Commission, in this consultation, has produced proposals which provide a logically consistent, relatively simple and practical solution to this legislative conundrum. We support this solution wholeheartedly.
5. The Commission's Terms of Reference for this project include proceeding to the preparation of a draft Bill. We agree that this stage of the project should be carried out as quickly as possible, and on the basis of the provisional proposals put forward by the Commission. However, it should be recognised that previous attempts to reform the law of corruption have run into considerable opposition on a number of fronts. There are elements of the Commission's proposals (see below, on facilitation payments in particular) where the existence of continued opposition may not have been sufficiently anticipated by the Commission.
6. The proposals result in a relatively narrow definition of bribery, compared with the main alternatives of "undue influence" or "improper payment". These alternative proposals for the basic model of bribery would have included a wider range of behaviour, which would have then resulted in the need for more exceptions or defences for behaviour which is considered acceptable business conduct in the UK. This narrower approach will lead to a better legal environment, with grey areas being better dealt with by regulatory, contractual or administrative means, and with Codes of Practice replacing the blunt instrument of the criminal law.

7. Discussion with regulators, employers and other stakeholders may also assist in building support for the Commission proposals in areas which may impact on their regulatory or contractual arrangements, and ensure that subsequently drafted legislation does not have unintended consequences which inhibit their ability to regulate and control behaviour in areas which they can deal with more appropriately and efficiently than can be done by the Courts.

RESPONSES ON MORE DETAILED POINTS

Reforming Bribery and a Model for Reform

8. The consultation proposes a single basic formulation for the offence of bribery, in the context of the United Kingdom, without distinction between the public and private sector. We agree. Not only does this minimise complexity, in circumstances where it is not necessary, but in addition it is becoming increasingly difficult to draw an appropriate line between the public and private sectors, where many public functions are provided by private sector organisations. [Q12.1]
9. We agree that the offence of bribery in the UK should be built on the basis that some “improper conduct” is performed or promised in exchange for a reward or other advantage. This provides a single logical and comprehensible foundation, which appears to cover the great majority of circumstances which it would be desirable to outlaw. We also agree that the improper act concerned should be a breach of a legal or equitable duty, which could be a cause of action in a Court of law. [Q12.4]
10. The paper considers alternative formulations, including the making or acceptance of payments for “improper influence”. This would be difficult to formulate without the danger of drawing some elements of normal business practice into the scope of the criminal offence, including commission payments and reasonable levels of sales promotions and corporate hospitality. We therefore agree that this model should not be used. [Q12.3]
11. The making or acceptance of a payment or other advantage which is in itself improper would also be too wide a class of action to come within the scope of an offence of bribery. If there is no intention on the part of any party that there should be a breach of duty as a result of the payment, it would be sufficient for these classes of behaviour to be dealt with under employment law, or by Codes of Practice, rather than in the criminal law. We would not consider it necessary for a separate offence to be introduced of accepting an advantage in breach of a duty not to do so,. [Q 12.2 & 12.5].

Trading in Influence

12. We agree that it should be immaterial whether the payment for an improper act is made directly to the person who is expected to carry out that breach of trust or a third party. Besides its equal culpability to direct bribery in individual cases, the existence of trading in influence risks increasing the spread of corruption, by introducing a sophistication and facilitation of bribery in otherwise honourable societies. [12.13]

Foreigners and Foreign Public Officials

13. We note the provisional proposal that the general offence of bribery should apply to natural persons who are resident in the UK as well as UK nationals, wherever the bribes may be paid or the breach of duty take place. We have some concern that such a provision could smack of unnecessary extra-territoriality, where foreign nationals are involved in bribery where payment and breach of duty take place wholly on foreign territory. However, we also understand the need to ensure that the whole of the business community in the UK are held to the same high standards, whether or not they are UK nationals. On balance we therefore agree that the general offence of bribery should apply equally to citizens and residents of the UK, subject to appropriately clear and well defined definitions of residency. [12.52]
14. We also note the difficulty that can be (and has been) experienced, where public officials in some jurisdictions may have duties which are unclear, due to confused or unsatisfactory national or regional constitutions or legal environments. We regret the necessity for a separate offence which will apply to the payers of bribes to foreign public officials, but acknowledge that an additional offence based on the types of behaviour which the payer is seeking from a foreign official appears to be the most satisfactory solution. [12.29]
15. However, the additional offence should be drafted to be as consistent as possible with the domestic bribery offence. Payment in relation to behaviour should not be within the scope of the additional offence, if it would not be within the scope of the domestic bribery offence. That is, behaviour which would not constitute a breach of duty if committed by most UK public officials (or an actual duty of the official concerned) should not be within the scope of the offence in relation to foreign public officials. Whether or not the payment is made improperly, if no unfair or inequitable advantage is sought then an offence of bribery is not the appropriate solution. Intending to influence a foreign public official should not be enough, if the influence is only intended to induce him in the fair conduct of his public responsibilities. The arguments for this approach are well rehearsed in relation to the general offence of bribery and apply equally well in relation to a specific offence for the bribery of foreign public officials. [12.30]
16. We agree that this offence should not be committed where the payment was “legitimately due” to the recipient and that payers should be allowed to tender evidence that the official was legally entitled to receive it, such as written rules or regulations. However, though account should not necessarily be taken of either customary practice or official tolerance of the payment, it should be recognised that it will not always be easy to prove legitimacy (See paragraph 20 below) [12.31]
17. The Commission specifically asks whether foreign public officials who are the recipients of bribes under this heading should be capable of committing this offence, as well as payers. On balance our view is that they should not. We believe that the UK should be cautious in any reform which could appear to extend the extra-territorial effects of its law beyond what is required by international convention. It should not be the remit of the UK to decide what is or is not permissible to foreign public officials. [12.32]

Facilitation Payments

18. Appendix F of the Paper considers the issue of facilitation payments in some detail, first defining the concept and then outlining the damaging effects that they can have on economies and the rights of the poor and disadvantaged as well as on commerce. It then goes on to conclude that facilitation payments should not be the subject of different treatment to other bribes, but that they should be subject to the “improper conduct” test as with larger bribes. We agree with the Commission’s conclusions, but not with all aspects of its reasoning.
19. In paragraph F.30 the view is expressed that the vast majority of facilitation payments would be caught by the “improper conduct” model, on the basis that almost all such payments are paid in order to achieve an unfair advantage in the ordinary course of business. We are sceptical of this conclusion – we understand that there are jurisdictions where a payment is required in order to ensure that minor public duties are carried out at all. For example, goods may be retained in customs long after those of a competitor have been released, so that payment to achieve an unfair advantage is not in question - rather one is needed to achieve broadly fair treatment. Similarly, mail which has reached the local sorting office may not actually be delivered until a fee has been paid, notwithstanding that the normal conventions of prepayment of postal charges apply in that jurisdiction.
20. In the UK and other jurisdictions, a fee may be payable for the conduct of a public function – for example, a fee is charged by the registrar or clergyman to carry out a marriage ceremony in the UK, that has legal and other public effects. In less sophisticated jurisdictions, a fee may be equally appropriate for some public functions, but has not been provided for in legislation or codes of conduct. Payments may be legitimate in the jurisdiction where they are paid, but not necessarily be provably so. The fact that legitimacy of payments cannot be proved should not for that reason make them fall within the offence of bribery.
21. Payments made to secure the carrying out of a public function fairly can be damaging, in that this class of facilitation payment may tend to lead to a culture in which they are expected universally, and may grow to be unaffordable by the poor leading to unfair social disadvantage. However, there are many grey areas which would be inappropriately criminalised if this category of payment is included in the scope of bribery. There may also be unintended consequences as well. For example, jurisdictions will not be helped to raise their standards of public conduct if the only commercial concerns which are easily able to trade in their country are those which are prepared to break the law.
22. For these reasons, we agree that for facilitation payments, as for all other bribes, the dividing line for the definition of the offence should be set on the basis of “improper conduct”. However, it should be recognised that this is not an ideal solution and that further action is desirable internationally, in individual jurisdictions and within the business community, to try and ensure a far higher level of transparency for fees which are legitimately chargeable for the conduct of public functions, and the suppression of those which are not. However, we do not think that this is an appropriate function for the criminal law on bribery in the UK.
23. We agree that the fact that payments are small or carried out in the ordinary course of business should make no difference as to whether or not they are bribes, any more than small thefts are outside the scope of that criminal offence.
[12.9]

Commission Payments

24. We agree with the Commission's provisional conclusion that there should be no specific exemption for commission payments, from the general offence of bribery. An offence should be committed where a payment forms the reason why (for example) an investment intermediary fails in his duty to act in the best interests of the buyer of, or investor in, the product concerned.
25. The Commission discusses the regulation of commission payments by the FSA, who has the primary responsibility for the fair use of them by the financial services industries, and which carries out this task by a series of regulatory rules and guidance enforced by administrative provisions. However there are a number of other aspects of the FSA's responsibilities where their own rules and guidance are backed by criminal provisions, including in the areas of anti-money laundering systems requirements and insider dealing. The backing of administrative provisions with criminal offences can mean that those bound by the provisions treat the need to comply with more seriousness, thus enabling the regulator to take a less detailed and bureaucratic approach to rule making and enforcement.
26. However, in developing their further thinking on this matter, the Commission would be advised to consult the FSA to ensure that a seamless approach to commission payments in the financial service industries is taken and that unintended consequences are avoided. It would be unfortunate if it were to become less easy for citizens in the UK to invest for their future, due to a decline in the number of investment intermediaries who can inform them of the best way in which to do so.

Corporate Hospitality

27. Corporate hospitality is the third problem area that the Commission deals with in some detail. In this area as well, we agree that the "improper conduct" model provides an appropriate dividing line between that which should be considered to come within the scope of the criminal offence of bribery and that which should not. Other improper payments could be made or influence given, but these are better dealt with by terms of employment or Codes of Practice.

Corporate Liability

28. We agree that as many aspects as possible of consideration of the law relating to the corporate liability of legal persons for offences of bribery, and similar issues surrounding the liability of legal persons and their officers, should be deferred pending the Law Commission's wider review of this area. Consistency of liability across all aspects of the criminal law is highly desirable. However, in the meantime, individual officers or employees should not be left in the position where they are shouldering the blame for offences that would more reasonably be borne by their employer. [12.42 – 12.51]

INTERNATIONAL GOOD PRACTICE

29. The reform of the law in the UK should so far as possible support and be consistent with private sector efforts in the fight against bribery and corruption. In this context we would like to draw the attention of the Commission to the World Economic Forum's [Partnering Against Corruption Initiative](#) (PACI). We are pleased to see that the PACI principles give definitions of bribery and facilitation

payments which would have an effect which is consistent with those being proposed by the Law Commission.

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