HOUSE OF LORDS

Select Committee on the Constitution

7th Report of Session 2009–10

Clause 12 of the Bribery Bill: Further Report

Report

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Select Committee on the Constitution

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Clause 12 of the Bribery Bill: Further Report

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.

2. In our first report for this session the Constitution Committee drew the attention of the House to clause 12 of the Bribery Bill.[1] The Government have now responded to our report and have at the same time tabled amendments to clause 12, to be moved on Report. The Report stage is scheduled for 2 February 2010. The Government's response is appended to this report.

3. As introduced, clause 12(1) provided as follows:

   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.

4. In our first report on this clause we raised two concerns. First, we argued that the defences provided for in the clause were, in several respects, too widely drawn and were therefore over-inclusive. Secondly, we argued that the defences should be accompanied by a system of prior ministerial authorisation. In their response and proposed amendments the Government have largely met our first concern, but not our second.

The breadth of the defences

5. We were concerned that "law enforcement agency" included not only the police but a large range of other bodies, including local trading standards and environmental health officers, and that no case had been made as to why such bodies should have a defence to a charge of bribery. Our concerns met with widespread support from all sides of the House on second reading and in Grand Committee, and **we are pleased that the Government have now tabled an amendment to omit clause 12(1)(a) from the Bill.**

6. We were additionally concerned that the defence in clause 12(1)(b) was too broadly crafted. The security and secret intelligence services possess statutory functions with regard to national security, safeguarding the economic wellbeing of the United Kingdom, and assisting in the prevention and detection of serious crime. We argued that, even if there was a case for the

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1 Constitution Committee, 1st Report (2009–10), HL Paper10.

services to enjoy a defence to a charge of bribery in the contexts of national security and serious crime, it was not self-evident that they should likewise enjoy such a defence when they are acting in pursuance of their statutory function of safeguarding the economic wellbeing of the United Kingdom. In their response to our report **the Government have now explained why they consider this to be necessary.** Likewise we were also concerned as to why the defence in clause 12(1)(b) should extend not only to the Security Service and the Secret Intelligence Service but also to GCHQ. The Government have now explained the reasons for this.

7. In our earlier report we raised no objection to the width of the defence in clause 12(1)(c).

A system of prior authorisation

8. As we explained in our previous report, the Bribery Bill was preceded by a Draft Bill, which was scrutinised in great detail by a Joint Committee. The Draft Bill contained no "defences" clause similar to clause 12. Instead, in clauses 13–14, it provided for a system of prior ministerial authorisation. **From a constitutional point of view the advantage of a system of prior ministerial authorisation is that it provides a measure of oversight by a Minister who is accountable to Parliament.**

9. In their response the Government explained their reason for abandoning in the Bill the scheme of prior ministerial authorisation which had featured in the Draft Bill: namely, that including additional agencies within the scope of the defences in clause 12 meant that a prior authorisation scheme would not be "workable … without imposing an undue administrative burden". This explanation is unpersuasive since a prior authorisation scheme could allow for authorisation, where appropriate, on a class basis. Moreover, since the Government have agreed to remove clause 12(1)(a) from the Bill, the only new agency is the armed forces.

10. The Government also suggest that the clause 12 defence "has a number of advantages over the authorisation scheme" in that it is "more focused and case specific". In the Committee's view it is unsatisfactory to leave regulation of possible acts of bribery by the State to post-event assessment through the criminal law. It is highly desirable that such acts do not occur unless authorised in advance by a Minister answerable to Parliament. In our view, it is not a question of choosing between prior authorisation (which may be on a class basis) and case specific assessment of whether to bring a criminal prosecution. The Committee considers that both protections should be available. An act of bribery by the State should not occur without prior authorisation, and there may be rare cases where such authorisation has occurred (in particular on a class basis) where the individual defendant appears to have acted improperly in performing an authorised act of bribery, and so a prosecution should be considered.

11. **We reiterate our recommendation that the defences in respect of both the intelligence services and the armed forces should be accompanied by a system of prior ministerial authorisation.**

Process Issues

12. The quality of the lawmaking process is one of the Committee's ongoing concerns. Among other matters, we have been keen to promote pre-

legislative scrutiny, recommending a range of technical improvements.[2] Self-evidently, Government proposals at the pre-legislative stage cannot be expected to be fully-formed. Likewise, ministers may sometimes have to rethink a proposal in light of pre-legislative scrutiny. None the less, the Committee is concerned about the manner in which clause 12 has been presented to Parliament. There was no proposal in the Draft Bill to seek to exempt law enforcement agencies from the law of bribery. **It is a matter of regret that the Government failed to produce a properly rounded set of proposals in the Draft Bill, so denying pre-legislative scrutiny on a matter where the need was considerable.**

13. Further, the Explanatory Notes on clause 12 were notably opaque. They made no reference to the major set of changes from the corresponding clauses of the Draft Bill; nor did they call the attention of the reader to the definition of "law enforcement agency" in clause 12(2). **We underline the importance, as a matter of good legislative practice, of the Explanatory Notes accounting for major departures from a Draft Bill.**

14. Finally, we note that while our first report on the Bribery Bill was published on 4 December 2009, we received the Government's response only on 28 January 2010. **Given the importance of ensuring proper parliamentary scrutiny, including by this Committee, it is a matter of regret that the Government's response was so delayed.**

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2 See most recently, Constitution Committee, 8th Report (2008–09), *Pre-Legislative Scrutiny in the 2007–08 Session* (HL 66).

GOVERNMENT RESPONSE

Letter to the Chairman from Lord Bach, 27 January 2010

I am writing to respond to the Constitution Committee's report on clause 12 of the Bribery Bill.

I am sorry that it was not possible to respond earlier. As my letter of 15 January indicated, Claire Ward and I wanted to reflect carefully on the debate in Grand Committee on 13 January before responding to the Committee's report.

In the light of the concerns expressed by the Constitution Committee and subsequently during the debate in Grand Committee we have looked again at the provisions in clause 12, particularly as it applies to law enforcement agencies. Following consultations with ACPO, SOCA, HMRC, the UK Borders Agency and the Scottish Government we have concluded, with the agreement of these law enforcement agencies, that on reflection the defence was not essential for them to be able to operate effectively. Accordingly we now propose to remove clause 12(1)(a) and limit the defence to persons pursuing the legitimate purposes of the Intelligence Services and armed forces. The attached response to the Committee's report sets out why we consider in vital to the operational effectiveness of the Intelligence Agencies and the armed forces that the defence continues to be available in their case.

I am most grateful to the Committee for its analysis of clause 12 and I hope that the Governments response to its report will reassure the Committee that clause 12, in its amended form, represents a proportionate and balanced approach to this important and complex issue.

Government Response to the Select Committee on the Constitution Report of 4 December 2009 on Clause 12 of the Bribery Bill (HL10)

1. 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.

2. The Government remains convinced that there is a need for the Bill to cater for certain State actors who would otherwise be at risk of prosecution under the Bill when performing their important functions on behalf of the public. Indeed the Joint Committee which scrutinised the 2003 draft Corruption Bill appeared to accept the need in principle for a provision relating to the intelligence services.

3. Given the timescales involved in preparing the draft Bill after publication of the Law Commission's Report on which it was based in November 2008, and our wish to afford the Joint Committee as much time as we possibly could to consider the draft Bill, we were, with regret, unable to complete the necessary preparatory work in time to include the likes of the armed forces in the draft Bill.

4. Given the need to include additional agencies, our ongoing consultations revealed that a workable authorisation scheme which would provide effective scrutiny could not be designed for those bodies, in addition to the intelligence services, without imposing an undue administrative burden. We therefore opted for a defence. Clause 12 of the Bill provides 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 intelligence services, or (c) the proper exercise of any function of the armed forces when engaged on active service.

5. We consider that this defence has a number of advantages over the authorisation scheme. Although, the defence potentially covers a broader range of authorities, it is a more focussed and case specific mechanism than the authorisation scheme included in the draft Bribery Bill. A broad based authorisation scheme needs to provide for the possibility of wide "class authorisations" if it is to be practicable and not place an unmanageable burden on the Secretary of State. By contrast the defence relates to specific conduct on the part of individuals that will need to be considered on a case by case basis if the defence is to be available.

6. There is a precedent for a defence of this type for the intelligence services and those involved in the prevention and investigation of crime under section 1B of the Protection of Children Act 1978 (as amended by section 46 of the Sexual Offences Act 2003).

7. We welcome the fact that the Constitution Committee had no objection to the defence in respect of the armed forces. We comment further about law enforcement authorities below.

8. The defences provided for in clause 12(1)(a) and (b) are drawn too widely, in three separate respects. 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".

9. Parliament has conferred statutory functions on the Security Service, relating to national security, economic wellbeing and acting in support of law enforcement agencies in the prevention and detection of serious crime, while in the case of GCHQ and SIS, Parliament has determined that their respective functions should be exercisable for the purposes of national security, the economic wellbeing of the nation and the prevention and detection of serious crime. It would be inappropriate to differentiate between these core functions. To do so would undermine the ability of the Services to combat all relevant threats to the United Kingdom. Safeguarding the economic well-being of the UK may require the intelligence services to take action to monitor events and trends that might have a serious effect on the UK economy as a whole. This could include intelligence on instability in a part of the world where substantial UK economic interests were at stake. It might also concern threats to the supply of energy or other commodities vital to the UK economy; or external attempts to manipulate commercial markets, especially where such actions could undermine confidence in the City of London or the stability of other financial markets.

10. The effectiveness of the defence would also be prejudiced by excluding one of the intelligence services' core functions. There is considerable overlap between these functions and it will not always be apparent, at least not initially, to what function the conduct in question related. It would be inappropriate, for example, to deny the defence where a bribe occurred in pursuit of one function but, on subsequent analysis of information provided, fell within the scope of another function.

11. We are confident that the defence complies with our international obligations. Clause 12 specifically excludes from the defence the bribery of a foreign public official to obtain or retain business or an advantage in the conduct of business. We

therefore see no justification for excluding activities related to the economic well-being function from the defence in clause 12(1)(b). It is important that the intelligence services retain the ability to safeguard the UK against attempts to use economic levers as hostile policy tools and to undermine this country's economy.

12. 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.

13. GCHQ is an integral part of the United Kingdom's national intelligence machinery, working in partnership with the Security Service and Secret Intelligence Service. The exercise of its intelligence function is limited in the same way as the other intelligence services in the interests of national security; the economic well-being of the UK; or in support of the prevention or detection of serious crime. Although there are far fewer circumstances in which GCHQ would need to act in a manner likely to constitute an offence under the Bill, this does not mean that there are no relevant circumstances that apply to GCHQ.

14. In order to maintain a strategic intercept capability and in order to continue to provide intelligence on certain targets critical to the UK's national security interests, GCHQ may need to provide equipment or assistance to individuals who are in a position to support its interception mission in challenging environments. In some cases this may constitute the conferring of an advantage as an inducement to undertake, or reward for, conduct that would amount to a breach of an expectation of trust owed by that person to his or her employers. This would amount to an offence under the Bill without the defence.

15. The inability to deploy advantages and other inducements where it is necessary to fulfil GCHQ's functions would be potentially damaging to the operational effectiveness of the UK intelligence machinery as a whole. We therefore consider that the defence in the Bill should be available to GCHQ on the same basis as the other services.

16. 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.

17. The Constitution Committee's report noted with concern that the definition of law enforcement agency in the Bill extended beyond the police to other law enforcement agencies, such as HM Revenue and Customs, as well as local authority trading standards and environmental health officers. Certain law enforcement agencies tasked with preventing and detecting serious crime may on occasion have to use financial or other inducements to carry out their functions, for example to secure critical intelligence on organised criminal activity. However, in the light of the Constitution Committee's report and the views expressed during the consideration of the Bill in Grand Committee, we have reviewed the defence as it relates to "law enforcement agencies" and have decided not to retain it as it would apply to these agencies. We have therefore tabled amendments for Report stage to remove clause 12(1)(a) from the Bill.

18. 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.

19. The Government had originally proposed in the draft Bill a scheme for prior authorisation by the Secretary of State of conduct by the intelligence services. Following further consideration, including in the light of the report by the Joint Committee on the draft Bribery Bill, the Government concluded that the approach adopted in clause 12 is to be preferred. As already explained above, we consider that the defence in clause 12 has a number of advantages over a scheme along the lines proposed by the Constitution Committee for prior authorisation of conduct by the Attorney General or the Secretary of State. In place of prior authorisation by Ministers, which may be on a class basis and for a period up to 6 months, the defence ensures that the necessity or otherwise of the conduct is tested by reference to the roles of individual people and the particular circumstances of individual cases. Prosecutors will review cases which are passed to them independently and in accordance with the usual evidential and public interest tests. It is for the defendant to prove the defence on the balance of probabilities in any case that reaches court.