

# Summary: Intervention & Options

<b>Department /Agency:</b> Ministry of Justice	<b>Title:</b> Impact Assessment of bill on reform of the law on bribery	
<b>Stage:</b> Implementation	<b>Version:</b> 2	<b>Date:</b>
<b>Related Publications:</b> The Law Commission's Report 'Reforming Bribery' of 20 November 2008.		

**Available to view or download at:**

<http://www.lawcom.gov.uk/docs/lc313.pdf>

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**Telephone:**

**What is the problem under consideration? Why is government intervention necessary?**

Bribery is already criminalised by the Prevention of Corruption Acts 1889 -1916 and common law, but the law in this area is in need of reform. The current law is fragmented and very old. Bribery is a serious crime that destroys the integrity, accountability and honesty that underpins ethical standards both in public life and in the business community. Reform of the law on bribery is necessary to deal effectively with the increasingly sophisticated, cross-border use of bribery in the modern world. In addition the current law has been criticised by domestic and international stakeholders alike. The Bill will ensure our laws are at the forefront of the fight against bribery.

**What are the policy objectives and the intended effects?**

The objective is to provide modern legislation criminalising bribery, allowing the police, prosecutors and the courts to tackle bribery effectively whether committed at home or abroad. By modernising the legislation we are creating a single piece of legislation updated and designed to tackle the issue of bribery with regard to the environment companies may now face. We believe it will provide the private sector and affected companies with greater certainty and consistency around the issue of bribery and their obligations. A modern and effective law against bribery will help bring to justice those involved in bribery and also reinforce ethical conduct in the commercial world and society generally. In addition to these general objectives the Government specifically wishes to tackle cross border bribery by UK businesses in relation to overseas public procurement exercises.

**What policy options have been considered? Please justify any preferred option.**

The following policy options have been assessed:

1. Do nothing.
2. Modernise and consolidate existing general bribery offences.
3. In addition to Option 2, introduce new offences of bribery of a foreign public official and of corporate failure to prevent bribery.

Option 3 is preferred as this specifically addresses commercial bribery where existing UK legislation is more in need of reform. Option 3 also best implements the Law Commission's recent review of bribery offences.

**When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?** We intend to review the legislation between three to five years after the legislation comes into effect.

**Ministerial Sign-off** For Impact Assessments:

*I have read the Impact Assessment and I am satisfied that the assessment (i) represents a fair and reasonable view of the expected costs, benefits and impact of the policy and (ii) the benefits justify the costs.*

Signed by the responsible Minister:

.....Date:

# Summary: Analysis & Evidence

<b>Policy Option 2</b>	<b>Description: Modernise and consolidate existing general bribery offences.</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>	Description and scale of <b>key monetised costs</b> by 'main affected groups'.		
	<b>One-off (Transition)</b> <b>Yrs</b>			
	£			
	<b>Average Annual Cost</b> (excluding one-off)			
	£		<b>Total Cost (PV)</b>	£
Other <b>key non-monetised costs</b> by 'main affected groups' One-off initial familiarisation and awareness costs for business and the UK authorities. One-off costs of establishing new primary legislation.				

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>	Description and scale of <b>key monetised benefits</b> by 'main affected groups'		
	<b>One-off</b> <b>Yrs</b>			
	£			
	<b>Average Annual Benefit</b> (excluding one-off)			
	£		<b>Total Benefit (PV)</b>	£
Other <b>key non-monetised benefits</b> by 'main affected groups' Reduced ongoing compliance costs for business and the UK authorities as a result of the law being clearer, simpler and quicker to understand and apply.				

**Key Assumptions/Sensitivities/Risks** We assume that the initial one-off costs are outweighed over time by the reduced ongoing compliance costs. We assume that both the one-off costs and the ongoing benefits are relatively small scale.

Price Base Year	Time Period Years	<b>Net Benefit Range (NPV)</b>	<b>NET BENEFIT (NPV Best estimate)</b>
		£	£

What is the geographic coverage of the policy/option?	England and Wales			
On what date will the policy be implemented?	To be confirmed			
Which organisation(s) will enforce the policy?	SFO, Police, CPS, Courts			
What is the total annual cost of enforcement for these organisations?	£ N/A			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£			
What is the value of changes in greenhouse gas emissions?	£ N/A			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)	(Increase - Decrease)
£ 0      Decrease of      £ 0	<b>Net Impact</b> £ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

# Summary: Analysis & Evidence

<b>Policy Option 3</b>	<b>Description: In addition to Option 2 adopt new offences of bribery of a foreign official and corporate failure to prevent bribery.</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' As in Option 2, initial one-off familiarisation costs will be relatively small scale. There might also be one-off business compliance costs from upgrading internal accounting and auditing systems, but as bribery is already a criminal offence these costs should be manageable. Ongoing government enforcement costs from one contested SFO prosecution every year (approx £2m, though £0.5m would be recovered through civil recovery procedures); one contested CPS prosecution every three years (approx £0.3m per year); and court costs (£0.3m per year).	
	<b>One-off (Transition)</b>	<b>Yrs</b>		
		1		
	<b>Average Annual Cost (excluding one-off)</b>	<b>Cost</b>		
	£ 2.0m	10	<b>Total Cost (PV)</b>	£ 17.2m
Other <b>key non-monetised costs</b> by 'main affected groups' Possible loss of business to UK businesses.				

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups'	
	<b>One-off</b>	<b>Yrs</b>		
	£			
	<b>Average Annual Benefit (excluding one-off)</b>	<b>Benefit</b>		
	£		<b>Total Benefit (PV)</b>	£
Other <b>key non-monetised benefits</b> by 'main affected groups' Savings to UK businesses from no longer paying bribes. Improved reputation for UK.				

**Key Assumptions/Sensitivities/Risks** Assume that UK enforcement activity is always successful.

Price Base Year 2009	Time Period Years 10	<b>Net Benefit Range (NPV)</b>	<b>NET BENEFIT (NPV Best estimate)</b>
		£	£ -17.2m

What is the geographic coverage of the policy/option?	England and Wales			
On what date will the policy be implemented?	To be confirmed			
Which organisation(s) will enforce the policy?	SFO, Police, CPS, Courts			
What is the total annual cost of enforcement for these organisations?	£ 2.0 m			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£ N/A			
What is the value of changes in greenhouse gas emissions?	£ N/A			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

<b>Impact on Admin Burdens Baseline (2005 Prices)</b>		(Increase - Decrease)	
£ 0	Decrease of £ 0	<b>Net Impact</b>	£ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Evidence Base (for summary sheets)

### **Introduction**

Bribery is currently criminalised under common law and the Prevention of Corruption Acts 1889-1916. The current law is fragmented and very old and is in need of reform. Bribery is a serious crime that destroys the integrity, accountability and honesty that underpins ethical standards both in public life and in the business community. Reform of the law on bribery is necessary to deal effectively with the increasingly sophisticated, cross-border use of bribery in the modern world. In addition the current law has been criticised by domestic and international stakeholders alike. Reforming the law will ensure our laws are at the forefront of the fight against bribery.

### **Review of Bribery and the development of the proposals:**

The Ministry of Justice has considered carefully the extensive body of work and consultation already carried out in this area by the Law Commission<sup>1</sup>. The attempts to reform the law on bribery date back to 1995 and the Nolan Committee's Report on Standards in Public Life, which was set up in response to concerns about unethical conduct by those in public office, and its suggestion that the Law Commission might usefully take forward the consolidation of the statute law on bribery. The Law Commission first made proposals for reform of bribery in a 1998 report:

<http://www.lawcom.gov.uk/docs/lc248.pdf>

The Government then set up a working group of stakeholders which met over the period 1998-2000, and this was followed in June 2000 by a Government White Paper on Corruption. This was positively received and led to a draft Government Bill in 2003:

<http://www.archive2.official-documents.co.uk/document/cm57/5777/5777.pdf>

A joint Committee of Parliament considered the Government Draft Corruption Bill in pre-legislative scrutiny. The Bill failed to win broad support, with criticism particularly of the retention of the agent /principal construct of the offence.

<http://www.publications.parliament.uk/pa/jt200203/jtselect/jtcorr/157/157.pdf>

The Government responded as attached to the Parliamentary Scrutiny Report:

<http://www.archive2.official-documents.co.uk/document/cm60/6086/6086.pdf>

A Government consultation exercise, "Bribery: Reform of the Prevention of Corruption Acts and SFO powers in cases of bribery of foreign officials, followed in 2005:

<http://www.homeoffice.gov.uk/documents/450272/2005-cons-bribery?view=Binary>

This concluded that, although there remained support for reform, there was no clear consensus on the form it should take. It was therefore decided to refer the matter back to the Law Commission for a further review. The Law Commission's terms of reference were to consider the full range of structural options for the law on bribery with a view to modernisation,

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<sup>1</sup> The Law Commission is a statutorily independent body, which reviews the law and makes recommendations to Government on reforms.

consolidation and reform. Law Commission issued a consultation paper “Reforming Bribery” (No. 185) in October 2007:

<http://www.lawcom.gov.uk/docs/cp185.pdf>

The Law Commission published its latest report on ‘Reforming Bribery on 20 November 2008.

<http://www.lawcom.gov.uk/docs/lc313.pdf>

The Law Commission’s report reflected the comments received from a number of stakeholders (listed at **Annex C**) during the formal consultation. The Law Commission also used an informal consultative group of stakeholders to finalise its proposals.

The Government published a draft Bribery Bill on 25 March 2009 building on the Law Commission’s most recent report. The draft Bribery Bill underwent pre-legislative scrutiny by a Joint Committee established by the two Houses of Parliament during the period of 12 of May - 17 June 2009. The Joint Committee heard oral evidence from 37 witnesses and received 61 written submissions, including from the CBI, the International Chamber of Commerce, the Federation of Small Businesses and representatives of the defence and engineering sectors. The report of the Joint Committee on the draft Bribery Bill was published on 28 July 2009. It included 39 conclusions and recommendations, most of which were supportive of the draft Bill. The Bribery Bill, as introduced, reflects many of the recommendations.

<http://www.publications.parliament.uk/pa/jt/jtbribe.htm>

The Government believes it is reasonable to conclude that the views of stakeholders have been fully taken into account in selecting its preferred course of action. We consider that the consultation already undertaken in the course of this and earlier reform initiatives, as well as informal consultations with a range of business, civil society and legal stakeholders since the publication of the Law Commission’s report, indicate that the options for reform have been thoroughly aired and discussed.

The main elements of the current Bribery Bill are set in **Annex A**.

## **Reasons for Government Intervention**

### **Inconsistent and overlapping legislation:**

The UK is developing a comprehensive strategy for tackling international corruption and reform of the law forms a fundamental part of the process to establish a clear legal framework to combat corruption and strengthen our work with international partners. The current UK law on bribery is complicated and fragmented across a number of statutes dating back to before the First World War. It has been criticised domestically and internationally for its lack of clarity and inconsistencies in the terminology used. Overlapping and inconsistent legislative frameworks cause problems for those that need to comply with the law, often leading to confusion about what needs to be done. Neither does it provide the right tools for the Government to ensure that bribery is deterred or punished effectively. This impedes an effective response to bribery. In addition, when jurisdiction for bribery was extended in 2001<sup>2</sup> the basic offence remained unchanged, taking no account of twentieth-century developments in business regulation and giving no legal recognition for good-faith efforts to avoid improper payments.

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<sup>2</sup> The Anti-Terrorism, Crime and Security Act 2001 Act put beyond doubt that the existing law applied to the bribery of a foreign public official, whether by an individual or by a corporate body and provided jurisdiction to prosecute acts committed abroad by UK nationals or UK registered companies.

## **Damage to the UK's reputation and our international obligations:**

The Organisation for Economic Co-operation and Development's (OECD) Bribery Working Group ("the WGB") monitors Member States' compliance with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was signed in 1997 and entered into force on 15 February 1999. It has criticised the effectiveness of the existing law in a number of respects, including bribery involving foreign public officials and corporate liability for bribery. Failure to implement law reform could bring into question the UK's commitment to the Convention. Failure to modernise the law could tarnish the UK's anti-bribery reputation

## **Impact on Business**

Bribery can take many forms and the risks it poses are a growing concern for both large and small companies. In relation to procurement exercises bribery can lead to distorted and sub-optimal decision-making - for example, the most efficient provider may not be selected to perform a service and this can mean that honest companies lose out. A quarter of UK-based international companies surveyed in 2006 said that they had lost business to corrupt competitors in the last 5 years (Control Risks).<sup>3</sup> Bribery can also lead to contracts not being specified or enforced properly. This could mean, for example, that the business which has won the contract through the use of bribery might not perform the services to the required standard, sometimes with dangerous consequences. Alternatively contracts might be over-specified with unnecessary gold plating to favour the business that has paid a bribe.

Bribery typically raises transactions costs and involves unnecessary intermediation, which can impair competition and raise the overall costs of procurement contracts. The World Bank has estimated that bribery adds up to 10% to the total cost of doing business globally.<sup>4</sup> Whilst bribery involves a transfer from the bidder to the recipient it is unlike a tax because it is not collected by a government and not necessarily redistributed to others, for example by financing a public service. Unlike paying a tax the transactions costs of making the bribery payment itself can also be very high, due to the covert nature of these payments. Bribery can have other longer term dynamic detrimental economic effects, in part because bribes are not transparent payments and because they introduce a new dimension of competition, perhaps to the detriment of other (more productive) dimensions. For example additional uncertainty might be introduced, price signals might be distorted, and incentives to invest and to innovate might be undermined.

Damage caused by bribery to brand and market valuation and the publicity of criminal investigation can also cause serious reputational damage to the businesses concerned. There is a great risk of major strategic disruption if corruption concerns arise, for example, during merger and acquisition or partnering negotiations. Lockheed Martin's proposed \$1.8bn acquisition of Titan was cancelled after due diligence discovered irregularities over payments to

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<sup>3</sup> Control Risks is an independent, specialist risk consultancy that provides advice and services that enable companies, governments and international organizations to manage strategic and operational risks. <http://www.controlrisks.com/>

<sup>4</sup> The World Bank is an international financial institution that provides financial and technical assistance to developing countries for development. This figure was quoted from Transparency Export Credit Guarantees Department Consultation on the Introduction of a product guaranteeing reimbursement of UK confirming banks under letter of credit arrangements report of July 2009, pg. 3 <http://www.transparency.org.uk/publications/57-product>

foreign officials. Titan shares subsequently dropped 20% and Lockheed had to forego an important strategic opportunity<sup>5</sup>

In summary bribery can have adverse implications for both the bidding business and the tenderer, and these are likely to exceed the implications of making transparent and efficient transfer payments. A recent study by Price Waterhouse Coopers<sup>6</sup> revealed that 65 per cent of businesses believed a level playing field is critical to their future operations. More than 70 per cent of businesses believed a better understanding of corruption would allow them to compete more effectively, make better decisions, improve corporate social responsibility and enter new markets.<sup>7</sup>

These findings are reinforced by our own survey of UK commercial organisations.<sup>8</sup> One financial firm that responded stated:

“The benefit of legislation for the financial services industry is that it will reinforce the integrity and positive image of the UK markets. It will send a clear message to the rest of the world that the UK takes corruption seriously and will hopefully encourage other countries to improve their standards, which will go some way to reducing bribery worldwide”

Indeed, from the perspective of UK companies, it should be emphasised that, in the context of increasingly competitive world markets, the ability of UK companies to compete would be enhanced if the implementation of anti-bribery standards was raised across the globe in such a way that UK companies were not disadvantaged as a result of overseas competitors offering bribes.

## **Impact on economic and social development**

Bribery is a prevalent problem that affects many countries, but it is particularly widespread in countries with ineffective institutional structures. The World Bank estimates that 15 per cent of all companies in industrialised countries have to pay bribes to win or retain business. In Asia this figure is at 30 percent. In the countries of the former Soviet Union 60 percent of all companies must pay bribes to do business.<sup>9</sup> Globally, this results in the payment of more than \$1000 billion (\$1 trillion) in bribes each year.

Bribery is especially harmful for developing countries where bribes paid to Government officials can lead to the allocation of national resources to unproductive activities. This can damage a nation's wealth and economic growth. It can also have a devastating impact on society as a whole by depriving citizens of their rightful share of economic resources and well functioning

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<sup>5</sup> UN Global Compact presentation by Karina Litvack, a representative of the major investor F & C which is a driving force on anti-corruption in the investment community ( see <http://www.icgn.org/advocacy/anti-corruption-practices-working-group/>). The Business Case for Anti-Corruption', Transparency International, the International Chambers of Commerce, UN Global Compact and World Economic Forum's Partnering Against Corruption Initiative, <http://info.worldbank.org/etools/antic/docs/Business%20Case/TheBusinessCaseAgainstCurrption.pdf>

<sup>6</sup> PricewaterhouseCoopers (PwC) is one of the world's largest professional services firms

<sup>7</sup> 'Anti-corruption Private sector -Confronting corruption -the business case for an effective anti-corruption programme', pg. 3. This is a report that is global in scope. It features analysis and commentary based on an online survey that was supplemented by in-depth interviews with senior executives and specialists in anti-corruption. [http://www.pwc.com/en\\_TH/th/publications/assets/confronting\\_corruption\\_printers.pdf](http://www.pwc.com/en_TH/th/publications/assets/confronting_corruption_printers.pdf)

<sup>8</sup> We consulted with businesses via the CBI, ICC and FSB. We received five responses in total, all from large companies: one from a pharmaceutical firm, two from banking/finance firms and two from risk management consultancy firms.

<sup>9</sup> Transparency International UK, Corruption Data <http://www.transparency.org.uk/corruption-data>.

public services.<sup>10</sup> This can drive citizens of those countries further into poverty and contribute to conflict and human rights abuses as the diversion of funds can result to reduce the effectiveness of aid flows.

The precise impact on the developing world is difficult to measure, but organisations such as Transparency International, U4 Anti-Corruption Resource Centre and the Economist<sup>11</sup> estimate that over 25 per cent of African states' Gross Domestic Product (GDP) is lost to corruption each year. That equates to more than \$148 billion a year and covers the full range of corruption, from petty bribes to inflated public procurement contracts.

According to Transparency International's Global Corruption Report 2009, corrupt politicians and government officials in developing and transition<sup>12</sup> countries alone receive bribes believed to total between \$20 and \$40 billion annually. That is the equivalent of some 20 to 40 per cent of official development assistance. But the cost can be measurable in more than money. Transparency International have argued that when corruption allows reckless companies to disregard the law, the consequences can range from water shortages in Spain, exploitative work conditions in China or illegal logging in Indonesia to unsafe medicines in Nigeria and poorly constructed buildings in Turkey that collapse with deadly consequences.<sup>13</sup>

### **Current multilateral action to tackle bribery and corruption**

We are committed to taking multilateral action to tackle both the supply of bribes and the demand from corrupt individuals. In order to build a global united front against this problem, however, we must first do our part by cracking down on foreign bribery and making the UK a hostile environment for those seeking to hide the proceeds of corruption.

Successful efforts to address the international dimensions of bribery will also enhance other programmes targeting the governance aspects of corruption at a country level, for example implementation of United Nations Convention Against Corruption (UNCAC)<sup>14</sup>.

We are therefore developing a Foreign Bribery Strategy to strengthen our work with international partners and complement existing strategies on anti-money laundering and asset-recovery. The main elements of the strategy are law reform; supporting ethical UK business; deterring misconduct by targeting rogue individuals or organisations; and stronger enforcement.

The new Bill is a key element of the Strategy, as it will provide organisations and individuals with greater clarity on the scope of the criminal law. A modern and effective law will also help to bring corrupt individuals and organisations to justice while encouraging and supporting the establishment of meaningful ethical standards in the commercial world and society generally.

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<sup>10</sup> Marcos Fernandes Goncalves da Silva, Fernando Garcia, Andrea Camara Bandeira 'How does corruption hurt growth? Evidences about the effects of corruption on factors productivity and per capita income 2007.

<sup>11</sup> Transparency International (TI) is an international non-governmental anti-corruption organisation.

The U4 Anti-Corruption Resource Centre assists donor practitioners in more effectively addressing corruption challenges through their development support. U4 serves seven development agencies: Norad (Norway), DFID (UK), CIDA (Canada), GTZ (Germany), MinBuZa (the Netherlands), Sida (Sweden), BTC (Belgium) and AusAID (Australia)

The Economist is a weekly news and [international affairs](#) publication.

<sup>12</sup> Transition country is a country which is changing from a [centrally planned economy](#) to a [free market](#) economy.

<sup>13</sup> Transparency International's Global Corruption Report 2009, pg xxv.

[http://www.transparency.org/publications/publications/global\\_corruption\\_report/gcr2009](http://www.transparency.org/publications/publications/global_corruption_report/gcr2009)

<sup>14</sup> UNCAC is a comprehensive global treaty providing a framework for collective action against corruption.

## **Policy Objectives**

Our main policy objective is to provide a modern criminal law to address bribery by UK persons or companies which takes place at home or abroad. The law should be simple enough so that it can be readily understood and provide sufficient legal clarity and certainty. At the same time the law should be flexible and sophisticated enough to differentiate between bribery and legitimate business practices, such as corporate hospitality.

A further policy objective is to address specific issues raised in relation to our obligations under international anti-corruption instruments. In particular we want to address the current difficulties in UK law of prosecuting cases of bribery involving foreign public officials, and as part of this to establish effective corporate liability for bribery. The proposals should support the Government's strategy for tackling international corruption not only by deterring and penalising bribery, but also by encouraging and supporting business to apply appropriate standards of ethical business conduct.

In this regard the Government has a specific objective of combating the use of bribery in high value transactions in international markets - in particular in large scale public procurement or similar tendering exercises in which predominantly only the largest businesses operate. The new corporate offence is intended to apply in these cases. Whilst the law will of course apply to all companies that fall within the scope of the definition of the offence, small and medium sized enterprises (SMEs) do not usually engage in the business environment described above and therefore in most cases would not fall within the main focus of enforcement activity.

## **Cost-Benefit Analysis**

In line with the Treasury Green Book this Impact Assessment considers the potential impacts of changes to bribery legislation with the aim of understanding what the net social impact to society might be from reform of bribery laws. As the changes are likely to affect future generations, we have assessed the impacts over the 10 year period 2009 to 2019. A real discount rate of 3.5% is applied in accordance with the Green Book. The summary pages of this Impact Assessment set out the total quantified costs over the whole 10 year period in present value terms.

Cost benefit analysis places a strong emphasis on the monetisation of costs and benefits. However, when considering reform of the bribery laws there are important aspects that cannot sensibly be monetised. These might include distributional impacts on certain groups of society. Cost benefit analysis in this Impact Assessment is therefore interpreted broadly, to include both monetised and non-monetised costs and benefits, with due weight given to those that are non-monetised.

In terms of **scope** the cost-benefit analysis aspect of this Impact Assessment covers impacts that fall within the United Kingdom. This includes all impacts that fall on UK business, on UK consumers on the UK public and on the UK Government. In considering the impact of reducing bribery in relation to overseas procurement exercises it is important to clarify that this cost-benefit analysis does not directly incorporate the costs and benefits which may accrue to overseas businesses, overseas persons, overseas consumers, overseas governments and the overseas public.

Nevertheless where the UK has a public policy objective relating to the economic wellbeing of overseas countries – for example, in the developing world – then these impacts, described above under “Reasons for Government Intervention”, are acknowledged. In doing so, however, this assessment does not seek to quantify any second level impacts, such as whether reduced bribery in the developing country might have implications for the level of aid provided to that country by the UK.

## **Economic Rationale for Intervention**

This impact assessment looks at impacts of changing the law on bribery. More specifically, the focus is on changing the law to reduce bribery by UK businesses in relation to large overseas public procurement exercises. These businesses would usually be large businesses, rather than small or medium enterprises and in economic terms would usually be operating in conditions of imperfect competition, meaning (amongst other things) that they would usually be making excess or super-normal profits.

In these circumstances bribery would constitute a transfer payment from a UK business to an overseas official in order to secure an overseas contract. From a UK perspective the ideal situation would be for UK businesses to secure contracts without making these additional payments. This is more likely to become possible if competing overseas companies also do not offer bribes.

At the same time, as far as the economic analysis is concerned, it could be argued that it would be better for the UK business to make some transfer payment if doing so avoided losing the contract to an overseas competitor (or at least it would be sensible for the UK business to make the minimum payment necessary to win and to do so up to the point where the transfer payment was not so large that all profits were wiped out).

However, if overseas businesses adopted the same position as the UK businesses in this example then all businesses might end up offering the highest bribes they could afford. They might all do so if they expected that other businesses were paying bribes, meaning that the cycle of bribery and corruption would be perpetuated. All businesses, including UK businesses, would then clearly be worse off than if none offered a bribe.

Economic theory suggests that the position where some businesses choose to bribe, but others do not might not be a stable long-term equilibrium. If one business bribed and won the contract but was not the most efficient business then there might be an incentive for other businesses to bribe in competition. Driving this behaviour would be an expectation by each business that its competitors would bribe.

From a UK perspective the economic rationale for intervention hinges upon ensuring that we avoid ending up in the position where all businesses pay bribes, in particular where all compete to pay the highest bribe. This would involve tackling the underlying expectations which drive the decision to bribe. In particular we want to encourage UK businesses to establish a credible expectation that they would not offer bribes. Government intervention can contribute to establishing this reputation in particular by ensuring that the UK has a sound legal framework which is actively enforced. Without this legal framework there could be an incentive for businesses to continue to risk paying bribes.

Taking a step back, such government intervention would be justified if the costs of establishing, complying with and enforcing the UK's legal framework did not outweigh the benefits to UK businesses in terms of avoiding making bribes in order to win contracts.

## **Policy Options**

### **Option 1: Do Nothing**

We assume under the 'do nothing' scenario that the position would remain as it is now – i.e. we would continue to rely on the existing bribery offences, but there would be no specific offences of failing to prevent bribery or bribing a foreign public official. As outlined in the 'economic rationale' section, the lack of a credible legal framework and proper business accountability would mean that UK businesses might be expected by overseas competitors to be tempted use bribes to win contracts. This in turn, might encourage overseas businesses to become increasingly inclined to offer larger bribes to compete with UK firms, thereby creating an unstable equilibrium.

## **Option 2: Modernise and consolidate existing bribery offences**

This option would modernise and consolidate existing offences but would continue to rely on the general active bribery offence to address bribery involving a foreign public official and would continue to rely on existing legal principles of corporate liability.

## **Option 3: In addition, introduce new bribery offences**

This option would build upon Option 2. It would involve addressing the bribery of a foreign public official by introducing a new discrete offence, and addressing corporate liability for bribery by introducing a new offence of failure to prevent bribery – both as recommended by the Law Commission.

## **Costs and Benefits of Policy Options**

### **Option 1: Do Nothing**

Given the assumption that doing nothing involves no change for businesses or enforcement authorities over time compared to the current position the costs and benefits compared to now are zero. As such a summary sheet has not been created for this option.

An alternative view, which we have not reflected here, is that we are currently in an unstable equilibrium position (see the 'economic rationale' section above) and that UK and overseas businesses are currently engaged in a downward spiral of bribery and corruption, with the size of payments steadily increasing. If this were so then a negative cost would be associated with doing nothing.

### **Option 2: Modernise and consolidate existing bribery offences**

The modernisation of existing offences is not expected to have a material impact on the existing level of bribery nor on the current level or nature of existing enforcement action taken in relation to bribery. Instead the main impacts are expected to relate to the costs of compliance with the legislation as a result of the law being easier to understand. For example some increased clarity would come about because the new legislation would discard the existing legal distinction between public and private sector bribery and would discard the agent/principal construct for the existing offence which has been the subject of significant criticism in the past.

### **Costs**

1. The Government would bear any additional costs relating to devising the new legislation and seeing it through Parliament. Strictly speaking this should not include past sunk costs, such as all of the costs associated with the history of these proposals as summarised in the opening section of this Impact Assessment.
2. The Government would bear any awareness and familiarisation costs associated with the enforcement authorities, including the police, prosecuting authorities and courts, gaining an understanding of the new law. There would be initial one-off awareness and familiarisation costs stemming from the introduction of the new law.
3. Business would also bear similar one-off awareness and familiarisation costs.

## Benefits

1. Whilst the Government may experience initial one-off familiarisation and awareness costs, the Government's ongoing familiarisation and awareness costs should be lower than they are now. These ongoing costs would relate to those coming new to this area for the first time, who would otherwise have had to get to grips with the old legislation. This reduction in ongoing costs would count as a benefit.
2. The modernised and consolidated legislation is also expected to be easier, simpler and quicker to apply and enforce in practice, for example as a result of providing greater legal clarity and legal certainty. This may generate some resource savings.
3. Business is expected to reap similar benefits in terms of reduced ongoing compliance costs. This may include reduced costs of obtaining legal advice. As one of the risk management companies that responded to our consultation stated, "This legislation is a driver for necessary business change and implementing adequate procedures will improve business process and thereby performance".

### **Option 3: In addition to option 2, introduce new bribery offences**

The costs and benefits which apply to Option 2 also apply to Option 3. In addition there would be other costs and benefits. A key consideration is how UK businesses might choose to behave in response to the new offences, for example how existing levels of bribery might change, and the impacts this might have on whether UK businesses continue to win the same overseas contracts as they would have done beforehand. Given that bribery by its very nature is covert and that the basis upon which overseas contracts are awarded is not always completely transparent it is difficult to base any assumptions here on a solid evidence base. Nevertheless we have made the following assumptions based upon economic likelihoods, notably;

- that some UK businesses are currently engaged in non-zero levels of overseas bribery and that this level of bribery may fall at the margin in some cases;
- that as a result of reduced levels of bribery some UK businesses may lose some overseas business at the margin (although in some cases the contract may be won by the same UK business even if the bribe was lower or no bribe was paid at all);
- that the new offences may generate increased enforcement activity by the UK authorities, reflecting an assumption that the new offences by themselves will not lead to all UK businesses immediately engaging in zero levels of bribery;
- In addition we have assumed for the sake of simplicity that all enforcement activity by the UK authorities in relation to the new offences will be successful.

### Costs (in addition to the costs of Option 2):

1. Loss of business: UK businesses might bear costs stemming from the assumed loss of business at the margin. We have no evidence relating to the likely size of these losses. Such losses would occur if, as a result of not winning a contract, the UK business was unable to engage in alternative business activity which was not equally as profitable. Losses might also be incurred as a result of the costs of failed bidding not being recouped.

2. Business compliance costs: UK businesses may bear additional costs relating to any changes to internal management, information, accounting and auditing procedures which are needed in order to comply with the new offences. We are primarily considering UK businesses engaged in larger overseas public contracts. Even if these UK businesses were not public companies we would expect that as a matter of normal business practice they would already have well developed internal procedures and would already monitor and manage the costs of competing in a significant overseas procurement exercise. In fact in practice we understand that a significant number of large companies already have established procedures of corporate governance in place which address the prevention of bribery either directly or indirectly by means of strategies, guidance and/or codes of conduct. This view was confirmed by the businesses that responded to our consultation.<sup>15</sup> Businesses responding during consultation indicated that they had written anti bribery policies in place, procedures for reporting abuses, training programmes for staff, had sought legal advice on bribery laws and had procedures in place for auditing business partners/agents in the UK and overseas. We have assumed that the few that currently do not address bribery explicitly would be capable of being readily directed to provide effective supervision.

Small or medium sized enterprises may not have previously addressed the need for anti-bribery measures. However, industry standards increasingly require this, with detailed sector-specific initiatives in the defence, oil and gas, mining, construction and pharmaceutical sectors. Companies meeting these various standards should already have access to the adequate procedures defence without incurring additional costs. The offence does not prescribe any specific additional measures which a business must adopt and there will be no compliance monitoring process. The defence provided to the offence is such that it would allow a business to adopt a proportionate approach, with small firms in low risk sectors able to argue adequate procedures on 'light touch' grounds, for example demonstrating that anti-bribery principles have been fully communicated to its workforce.

Our consultation with business did not provide sufficient data to afford realistic estimates of the costs of implementing any anti-bribery measures as a response to the new legislation. But given that bribery is already a criminal offence we consider that the additional one-off business costs associated with implementation of such measures should be manageable. The Government intends to publish guidance on the Act to help businesses understand what they have to do to comply with the new legislation.

3. Business evasion costs: UK businesses may bear additional ongoing costs in terms of deciding whether or not to update anti-bribery procedures in response to the new offence. Linked to this increased costs might be incurred if a UK business decided to continue bribing and had to find more expensive and covert ways of doing so without being caught by the authorities. These increased costs to business might be significant but are not normally caught by Impact Assessments.
4. Government enforcement costs: The Government would bear increased ongoing enforcement costs based on the assumptions outlined above. We estimate that there might be 1 additional contested SFO prosecution per year and 1 additional contested CPS prosecution every three years. The net additional costs of this enforcement activity would depend upon the nature of each case and the outcome of each case. For example the net costs to the UK Government would be much smaller if the UK business

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<sup>15</sup> We consulted with businesses via the CBI, ICC and FSB. We received five responses in total, all from large companies: one from a pharmaceutical firm, two from banking/finance firms and two from risk management consultancy firms.

was found guilty, if the Government's costs were awarded, and if a large fine was imposed. In addition the SFO might also be able to use its civil recovery powers. Recently the SFO made use of civil recovery powers under the Proceeds of Crime Act 2002, under which the SFO can recover property obtained by unlawful conduct without resorting to a prosecution. SFO estimate up to 3 extra civil recovery/monitoring orders on UK businesses per year. For these cases most costs could be recovered from the other party. On the other hand the net costs to the Government would be much greater if the Government lost a prosecution and if costs were awarded in favour of the defendant.

For the purpose of this Impact Assessment we have made the strong simplifying assumption that all SFO and CPS prosecutions will be successful, that costs will be awarded in favour of the Government, that fines will be imposed against the UK business and that SFO civil recovery procedures will be used successfully. Based on these assumptions we still consider that the Government might bear some net costs as a result of this enforcement activity. We have adopted the pessimistic estimate of up to around £2m per year, in light of SFO and CPS advice about the nature and complexity of possible cases.

The £2m figure includes the costs of SFO investigation and prosecution (estimated to be up to around £2m per case, though this figure is offset by the sum recovered through civil recovery procedures – approximately £0.5 million per case), costs to the CPS (assumed to be up to around £1m per case –an average of £0.3m per year); and Crown Court costs (assumed to be up to around £0.33m per year). There will be no significant implications for the prison estate as prosecutions of individuals are very rare (see statistics at **Annex B**) and do not necessarily result in prison sentences. The change to the law will only result in a very small number of additional prosecutions. Legal aid costs would not arise either.

5. Business enforcement costs: UK businesses would also bear costs in relation to this enforcement activity, i.e. from cooperating with investigations, from being prosecuted, from paying any resulting fines and from having any assets seized. Flowing from the assumption that all UK enforcement action will be successful this Impact Assessment does not take into consideration these business costs, which would stem from business breaches of the criminal law.

#### Benefits (in addition to the benefits of Option 2):

1. Business bribery savings: UK businesses may gain by no longer paying bribes, or paying reduced bribes, whilst still winning the overseas public procurement contract. It is not possible to quantify the size of this benefit as we do not have accurate information on existing levels of bribery or on how they might change in future.
2. Wider reputational benefits: The UK Government and UK businesses may gain some intangible reputational benefits.
3. Public policy benefits: The UK has a public policy goal to reduce the volume of bribery and corruption both as a matter of principle and because of the harmful effects experienced by overseas (developing) countries. The introduction of the new foreign public official and the corporate offences will facilitate prosecutions. There would therefore be a positive value to the UK if these reforms lead to a reduction in the level of bribery.

## **Specific Impact Tests**

### **Competition Assessment**

These proposals are not intended to undermine competition. If they have the desired impact they should not directly or indirectly limit the number or range of suppliers in or from the UK. Neither should they limit the ability of UK suppliers to compete legitimately for business. They aim to reduce incentives to bribe, which itself may harm suppliers' incentives to compete vigorously and fairly.

### **Small Firms Impact Test**

It is not anticipated that reform of bribery will have a greater impact on small business than others. The existence of the due diligence/adequate procedures defence to the new corporate offence allows a business to adopt a proportionate approach, with small firms in low risk sectors able to argue adequate procedures on 'light touch' grounds, for example demonstrating that anti-bribery principles have been fully communicated to its workforce.

Furthermore, the main focus of enforcement of the law is likely to be in combating the use of bribery in high value transactions in international markets where the risk of open competition being undermined by bribery is more significant. The main impact of this new offence will therefore be in the context of large scale public procurement or similar tendering exercises in which predominantly only the largest business bodies operate. Whilst the law will apply to all companies that fall within the scope of the definition of the offence, it is clear that small and medium sized enterprises (SMEs) do not usually engage in this business environment.

Our consultation with business did not provide sufficient data to afford realistic estimates of the costs of the new legislation to small businesses. But given that bribery is already a criminal offence we consider that the additional one-off business costs associated with familiarisation of the new legislation should be manageable for most small businesses. We intend to publish guidance on the Act which will help businesses (of all sizes) understand what they have to do to comply with the law.

### **Legal Aid**

There will not be any impact on Legal Aid. Clarification of the general offences may simplify the conduct of some cases, potentially resulting in savings, but this is difficult to estimate because the overall number of cases is so low. The introduction of a new corporate offence does not have any implications for Legal Aid because it would not attract Legal Aid.

### **Sustainable Development**

Not applicable

### **Carbon Assessment**

Not applicable

### **Other Environment**

Not applicable

### **Health Impact Assessment**

Not applicable

## **Race Equality/ Disability Equality/ Gender Equality**

We believe that there will be a positive effect on society in general from the clarification and modernisation of the existing bribery legislation. This is because reform will help to deter bribery and improve the effectiveness of the law in dealing with those who engage in bribery. We do not anticipate that the benefits of reform will impact differently on particular sections of law-abiding society.

There have been a number of Government and Law Commission consultation exercises on reforming the law on bribery dating back as far as 1997. In the Government's consultation paper on 'Bribery Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials' in December 2005, in the section dealing with 'issues of equity and fairness' it was said that "we do not think any of the options mentioned above [for reforming bribery] impact differently on individuals within the population according to their ethnicity, religion, nationality or gender". A range of groups were invited to respond including the Commission for Racial Equality, African Caribbean Finance Forum, Black MBA Association (UK) Ltd, Race Relations Committee of the Bar Association. No equality issues were identified as a result of this consultation exercise, nor in the earlier exercises. The current proposals for reform are based on Law Commission recommendations which were themselves the subject of consultation by the Commission in 2007. Again, no equality issues were identified for the reform of the law on bribery following this exercise.

We have also made recent enquiries of the Crown Prosecution Service, City of London Police (Overseas Anti-Corruption Unit) and the Serious Fraud Office, who are responsible for the investigation and prosecution of bribery. These enquiries have also indicated that the reform of the bribery laws will not impact differently on someone from a particular section of society

Bribery is not a volume crime and not limited to any particular group of people. Statistics indicate that in 2007 and 2006 there were only 10 prosecutions per year (see **Annex B**). We do not anticipate that the proposed reform of the law will result in a significant increase in the number of cases. The low level of offending would make the collection of additional evidence impractical.

We will monitor the available CJS statistics and consult the authorities using the legislation, i.e. Crown Prosecution Service, police and the Serious Fraud Office, and consider any specific representations we receive in order to identify any equality issues which may require further evaluation.

## **Human Rights**

The Government considers that the provisions of the Bill are fully compatible with the European Convention on Human Rights.

### *Failing to prevent bribery – defence of adequate procedures*

Clauses 7 and 8 would make it an offence for a commercial organisation to fail to prevent a person performing services for or on its behalf from committing certain bribery offences. That person must intend to obtain or retain business, or an advantage in the conduct of business, for the organisation. It would be a defence to a charge under this provision for the organisation to prove that it had in place adequate procedures designed to prevent such persons committing bribery offences.

Under the defence in clause 7(2), the defendant organisation would have to prove that the defence applies. The legal burden in respect of the defence will therefore fall on the defendant, to be satisfied on the balance of probabilities.

Article 6(2) of the Convention requires that every person charged with a criminal offence shall be presumed innocent until proved guilty according to law. Case law has established that, while placing a legal burden in relation to a defence on the defendant may call into question that general proposition, that will be compatible with the Convention where the overall burden of establishing guilt remains with the prosecution and the burden is otherwise reasonable and proportionate.

The Department considers that placing such a burden on the defendant in this case is reasonable and proportionate in the circumstances and is compatible with article 6(2).

The aim of the offence is to encourage commercial organisations to take responsibility for the actions of persons performing services for them or on their behalf where those actions are undertaken for the benefit of that organisation. Where the prosecution can show that an offence has in fact been committed by a person for the benefit of the organisation then the organisation will be liable unless it can show that despite the instant case of bribery it generally had adequate procedures in place which, on the whole, are successful in preventing bribery.

Placing the legal burden on the defendant is both reasonable and proportionate. The procedures an organisation has in place to prevent bribery being employed on its behalf are a matter that is peculiarly within its own knowledge and control. The organisation will have ready access to the information needed to establish the existence of the defence. In any event, there would be no absolute requirement to prevent bribery. In the light of this, it would be very difficult to place the legal burden on the prosecution to establish the contrary.

The Department notes that a substantial burden remains on the prosecution in establishing the offence. It must first prove to the criminal standard that a bribe was paid for the benefit of the organisation. Only once that direct link to the organisation has been made would the burden (on the civil standard) transfer to the defendant. Given the adequate procedures defence is not prescriptive then it is open to a defendant organisation to adduce evidence which shows that (for example) given the size of the organisation, the particular sector or country in which it operated and the foreseeable risks, its procedures employed to prevent bribery being committed on its behalf were otherwise adequate.

The defence was proposed by the Law Commission, which also concluded that the legal burden ought properly to be placed on the defendant organisation.

In the circumstances therefore the Department considers the reverse burden is compatible with Article 6.

#### *Defence for certain bribery offences: legitimate purposes*

Clause 12 of the Bill provides for a defence to certain bribery offences where it can be shown that the conduct which would amount to an offence was necessary for:

the prevention, detection or investigation by, or on behalf of, a law enforcement agency of serious crime,

the proper exercise of any function of the Security Service, the Secret Intelligence Service or GCHQ, or

the proper exercise of any function of the armed forces when engaged on active service.

As for the defence relating to commercial organisations (clause 7) the legal burden to prove the conduct was necessary shifts to the defence once it is established that an offence has been committed. The Department considers that placing the legal burden on the defendant to

establish the defence, in the particular circumstances, is compatible with article 6(2) of the Convention.

The overall burden of establishing guilt remains with the prosecution. The standard of proof which the defence will need to discharge will of course be on the balance of probabilities. The aim of the defence is to absolve those who perform functions for or on behalf of State bodies from committing offences where it is necessary for them to perform conduct in the course of their functions which may amount to bribery. Those circumstances are expressly limited to cases where there is a compelling need. In addition, showing necessity in the circumstances is something that would be peculiarly within the knowledge of the individual pleading the defence. In any event, it would be very difficult to place the legal burden on the prosecution to establish the contrary, particularly in the circumstances in which it is possible that the circumstances of the defence may be satisfied.

### *Repeal of the existing law*

The Department observes that the fact that the existing law of bribery is being repealed arguably has the effect of enhancing human rights.

Section 2 of the Prevention of Corruption Act 1906 introduced a presumption of corruption in certain cases involving corruption within the public sector. It applies where it is proved in any prosecution under the Public Bodies Corrupt Practices 1889 or the Prevention of Corruption 1906 Act that any consideration was paid to, given or received by an employee of the Crown, any Government Department or public body by another person (or their agent) seeking to obtain a contract from the Crown. The effect of section 2 is to place the burden of proof onto the defendant to prove on the balance of probabilities, that the relevant payment was not given or received corruptly. This means that the defendant bears the legal burden for disproving the 'corruptly' element of the offence in the specific circumstances covered by section 2.

Concerns have been raised in the past over whether the presumption in section 2 is compatible with Article 6(2) of ECHR. The Law Commission expressed concern around this issue in 1998 (albeit they did not reach a firm conclusion that the provision was not compatible). The Government's 2005 paper "*Bribery – Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials*" highlighted the point and pointed out that "*the CPS have concluded that the risk of ECHR challenge is so great that they do not in practice rely on the presumption*".

The proposals in the draft Bill will repeal the presumption in section 2 and therefore any possible doubts around the compatibility of the existing law in respect of section 2 will be removed.

### **Rural Proofing**

Not applicable

## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

### **Annex A: Summary of the main elements of the Bribery Bill**

The Bill proposes the following criminal offences;

- A general offence covering the offer, promise or giving of a bribe (active bribery).
- A general offence covering the requesting, agreeing to receive or acceptance of a bribe (passive bribery).
- A discrete offence of bribing a foreign public official to obtain or retain business.
- An offence based on the failure by a commercial organisation to prevent bribery by persons acting on its behalf.

The corporate offence is restricted to instances of active bribery on the part of a person associated with the business with the intention to secure or retain business. The offence is coupled with an adequate procedures defence which would allow the commercial organisation on behalf of which a bribe has been paid to avoid a conviction if it can show that it has adequate procedures in place to prevent bribery despite this instance.

## Annex B – Current Magistrates Court prosecutions

Bribery is not a volume crime. The number of persons proceeded against at magistrates' court and found guilty at all courts for offences under the Prevention of Corruption Act 1906 S.1 (1) and the Public Bodies Corrupt Practices Act 1889 S.1 (1) and 1 (2) in England and Wales from the period of 2004 to 2007 were as follows;

Statute	Proceeded against				Found guilty			
	2004	2005	2006	2007	2004	2005	2006	2007
Prevention of Corruption Act 1906 S.1(1),	3	1	6	5	4	1	10	12
Public Bodies Corrupt Practices Act 1889 S.1(1) and 1.(2)	1	-	4	5	-	-	3	-
<b>Total</b>	<b>4</b>	<b>1</b>	<b>10</b>	<b>10</b>	<b>4</b>	<b>1</b>	<b>13</b>	<b>12</b>

## **Annex C – Stakeholders**

The following stakeholders responded to the Law Commission’s consultation paper ‘Reforming Bribery’:

The Police Federation of England and Wales,  
Crown Prosecution Service,  
Serious Fraud Office,  
Department for Business, Innovation and Skills,  
Department for International Development,  
Attorney General’s Office,  
Foreign Office Common Wealth Office, Ministry of Defence Police,  
Confederation of British Industry,  
International Chambers of Commerce,  
Association Judicial and legal practitioners/bodies and academics,  
The Corner House,  
Fraud Advisory Panel,  
Public Administration Select Committee,  
Transparency International (UK) and  
UK Anti Corruption Forum.