# Dr Nicholas Ryder- Written Evidence (BRI0010)

## Introduction

The submission provides a summary of the research conducted by Professor Nicholas Ryder on the Bribery Act 2010. The submission presents a summary of the key findings in the hope that they will support the House of Lords Select Committee's inquiry into the Bribery Act 2010.

## Questions

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

*Background*

The United Kingdom's (UK) reform of its bribery laws began with the publication of a Law Commission Report in 1998.[1] The Law Commission recommended that 'the common law offence of bribery and the statutory offences of corruption should be replaced by a modern statute'.[2] The then Labour government responded by publishing the Corruption Bill, which after being subjected to pre-legislative scrutiny by the Joint Committee, was rejected, resulting in a revised version which was published in 2005.[3] This was followed by another consultation exercise by the Law Commission in 2007,[4] which subsequently led to the publication of its 2008 Report.[5] In response to this Report, and to emphasis the impetus to address the threat posed by bribery, the then Justice Secretary, Jack Straw MP stated "a new law will provide our investigators and prosecutors with the tools they need to deal with bribery much more effectively.[6] The Report was followed by the publication of a White Paper in 2009 that finally resulted in the enactment of the Bribery Act 2010.[7] Prior to its introduction, Kenneth Clarke MP, the then Secretary of State for Justice, stated that the Act would "reinforce its [the UKs] reputation as a leader in the global fight against corruption . . . The Act will ensure that the UK is at the forefront of the battle against bribery allowing the country to clamp down on corruption without being burdensome to business".[8] However, the provisions of the Bribery Act 2010 have received a mixture of responses from commentators. For example, some have suggested that the provisions 'go too far and fear [that] the new 'gold standard' legislation poses a threat to UK competitiveness'.[9] Conversely, it has also been described as a 'major piece of legislation, of immense practical importance to the conduct of business, whether in the public or private sphere'.[10]

*Enforcement – pre Bribery Act 2010*

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[1] Law Commission, *Legislating the Criminal Code: Corruption No. 248* (Law Commission 1998).
[2] S. Sheikh, 'The Bribery Act 2010: commercial organisations beware!' (2011) International Company and Commercial Law Review, 22(1), 1-16, 4.
[3] Home Office *Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery Against Foreign Officials* (Home Office 2005).
[4] Law Commission *Reforming Bribery: A Consultation* (Law Commission 2007).
[5] Law Commission *Reforming Bribery: A Consultation* (Law Commission 2007).
[6] Ministry of Justice 'Government Welcomes New Bribery Law Recommendations' (November 20 2008) <http://www.wired-gov.net/wg/wg-news-1.nsf/0/329BD09E4E75E8138025750700478C2E?OpenDocument> accessed 25 November 2011.
[7] The Ministry of Justice *Bribery: Draft Legislation* (The Stationery Office 2009).
[8] Ministry of Justice press release 'UK clamps down on corruption with new Bribery Act', <http://www.justice.gov.uk/news/press-release-300311a.htm> accessed 29 November 2011.
[9] T. Pope, and T. Webb. 'Legislative Comment – the Bribery Act 2010' (2010) Journal of International Banking Law and Regulation, 25(10), 480-483, 480.
[10] Editorial 'The Bribery Act 2010' (2010) Criminal Law Review, 6, 439-440, 439.

The enforcement response to the criminal offences under the Bribery Act 2010 has failed to achieve the political aspirations outlined above. A person found guilty of any of the offences contained in sections 1, 2 and 6 of the Bribery Act 2010 is liable to a maximum custodial sentence of 10 years imprisonment and/or an unlimited fine. For the offence found in section 7, the maximum penalty is an unlimited fine[11]. Although the Serious Fraud Office (SFO) is arguably the lead agency in prosecuting cases of bribery and corruption, proceedings under the Act require the personal consent of not just the Director of the SFO but also, either the Director of Public Prosecutions or the Director of Revenue and Customs Prosecutions.[12] The Crown Prosecution Service (CPS) has stated that not only is bribery a serious offence, but that 'there is an inherent public interest in bribery being prosecuted'.[13] In determining whether or not to prosecute, the CPS will take into account both aggravating and mitigating factors. These might include the amount of money involved; whether there has been a breach of a position of trust; whether it involved a vulnerable or elderly victim; the period over which the offence was carried out; whether any voluntary repayments had been made and whether there were any personal factors such as disability, illness or family difficulties.[14]

Historically, however, and particularly with reference to the situation prior to the Bribery Act 2010, there have been few criminal cases taken to trial (see below); with this situation continuing even after the *de Grazia* Review in 2008.[15] The few examples which do exist include one case from September 2009, where a British construction company, Mabey and Johnson, were held liable for bribing foreign officials in order to win business contracts. The company pleaded guilty to overseas corruption charges, for paying €1m million in bribes through middlemen with reference to £60-£70m contracts, and to the breaching of United Nations Iraq sanctions relating to Saddam Hussein's 'Oil for Food Programme'. The case concluded with a plea bargain, which led to a financial penalty of £3.5m, in addition to compensation payable to the countries of Ghana, Jamaica and Iraq and legal costs totalling £3.1m. Interestingly, this was the first conviction in the UK of a company for such offences with the SFO deciding to prosecute the company rather than the actual individuals involved.[16] However, the number of convictions has begun to increase and perhaps due to this there are now sentencing guidelines to help judges determine the most appropriate sentence. Initially the only available aid came in the form of two Court of Appeal cases; both of which were decided prior to 2010. The first *R v Anderson (Malcolm John)*,[17] involved the appeal of a sentence of 12 months imprisonment for accepting a bribe in return for contracts which were beneficial to the appellant's business. On the basis that the appellant was of previous good character and that the financial gain was relatively small, a sentence of six months was held to be more appropriate. The second is that of *R v Francis Hurell*.[18] The sentence in question was again for 12 months, but this time was for attempting to bribe a police officer, through the offering of £2,000 so that the officer would not carry out a breath test. Even though the Court held that any attempt to bribe a police officer in the execution of his duty was serious, it nevertheless substituted the sentence for one of three months.

Such guidance may have been useful in the case of Mark Jessop, who in April 2011 was sentenced to a two-year custodial sentence and ordered to pay £150,000 in

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[11] Bribery Act 2010, s. 11(3).
[12] Bribery Act 2010, s. 10.
[13] The Crown Prosecution Service 'Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions', <http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/> accessed 9 February 2016.
[14] The Crown Prosecution Service *'Bribery', Legal Guidance* (Crown Prosecution Service 2008).
[15] J. de Grazia, *Review of the Serious Fraud Office – Final Report* (Serious Fraud Office 2008).
[16] Case Comment 'First UK company convicted for overseas corruption' (2010) Company Lawyer, 31(1), 16.
[17] [2003] 2 Cr. App. R. (S.) 28.
[18] [2004] 2 Cr. App. R. (S.) 23.

compensation and £25,000 in prosecution costs. The orders were in relation to ten counts of engaging in activities which made funds available to the Iraqi government in contravention of UN Iraq sanctions, again in relation to the 'Oil for Food Programme'.[19] Other criminal prosecutions include Dennis Kerrison, Paul Jennings, Militiades Papachristos and David Turner, all former executives of Innospec Ltd, who in October 2011 were charged with corruption in relation to making and conspiring to make corrupt payments to public officials in Indonesia and Iraq in order to secure contracts for the business.[20] In January 2012 Turner pleaded guilty to three counts of conspiracy to corrupt and in June and July 2012 Jennings also pleaded guilty to three counts of conspiracy. Both Kerrison and Papachristos were convicted of one count of conspiracy each in June 2014.[21] Turner was sentence to 16 months in custody, suspended for two years with 300 hours of unpaid work. Kerrison, Jennings and Papchristos were sentenced to four years, two years and 18 months in custody respectively, although Kerrison's sentenced was later reduced to three years by the Court of Appeal. Innospec Ltd pleaded guilty to bribing state officials in Indonesia and was fined $12.7m.[22] The first criminal conviction of a corporate for offences involving the bribery of foreign public officials took place in December 2014. Smith & Ouzman Ltd, a company which specialised in printing security documents, was convicted of offences of corruptly agreeing to make payments totalling nearly £500,000.[23] The payments were used to influence who was awarded business contracts in both Mauritania and Kenya. Nicholas Smith (Sales and Marketing Manager) and Christopher Smith (Chairman) were also convicted. Smith and Ouzman Ltd was ordered to pay £2.2 million; Nicholas Smith received a custodial sentence of three years and Christopher Smith a sentenced of 18 months, suspended for two years, 250 hours of unpaid work and a three month curfew.[24]

*Enforcement – Bribery Act 2010*

The convictions covered so far in this report have been for offences under the old pieces of legislation, namely the Prevention of Corruption Act 1906 and the Criminal Law Act 1977. In December 2014, however, the SFO secured its first convictions under the Bribery Act 2010 against Gary West and Stuart Stone. Both men were executives of Sustainable Growth Group and/or its subsidiary companies. The men, with James Whale, were involved in a fraud to induce people to invest via a pension plan in green bio fuel products. West received bribes for his role in producing false invoices to facilitate the fraud submitted by Stone.[25] For the bribery offences, West received four years imprisonment and Stone six years.[26] Since the implementation of the Bribery Act 2010, there have also been a very small number of successful prosecutions brought by the Crown Prosecution Service. For example, in *R v Patel*, the defendant was a clerk at a magistrate's court clerk, who was bribed £500 for not inputting information about a traffic violation onto a court database. Patel later pleaded guilty and was sentenced to a total of nine years imprisonment for bribery and misconduct offences although this was reduced to four years on appeal. The

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[19] Serious Fraud Office, 'Medical goods to Iraq supplier jailed for paying kick-backs' (Press release 13 April 2011), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/medical-goods-to-iraq-supplier-jailed-for-paying-kick-backs.aspx> accessed 29 November 2011.

[20] Serious Fraud Office 'Innospec Ltd: Two more executives charged with corruption', (Press Release 27 October 2011), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/innospec-ltd-two-more-executives-charged-with-corruption.aspx> accessed 29 November 2011.

[21] It is worth noting that these were not offences under the Bribery Act 2010 but under section 1 of the Criminal Law Act 1977.

[22] Serious Fraud Office 'Innospec Ltd', (Case Information), available at https://www.sfo.gov.uk/cases/innospec-ltd/, accessed 10 February 2016.

[23] The offences were contrary to section 1 of the Prevention of Corruption Act 1906.

[24] Serious Fraud Office 'Smith and Ouzman Ltd', (Case information), available at: https://www.sfo.gov.uk/cases/smith-ouzman-ltd/, accessed 10 February 2016.

[25] Serious Fraud Office 'City directors convicted in £23m 'Green bio fuel' trial' (News Release 5 December 2014) available at: https://www.sfo.gov.uk/2014/12/05/city-directors-convicted-23m-green-biofuel-trial/, accessed 10 February 2016.

[26] Serious Fraud Office 'City directors sentenced to 28 years in total for £23 million green bio fuel fraud', (News Release 8 December 2014) available at: https://www.sfo.gov.uk/2014/12/08/city-directors-sentenced-28-years-total-23m-green-biofuel-fraud/, accessed 10 February 2016.

next successful prosecution under the Bribery Act was *R v Mushtaq*. The defendant offered a bribe to a licensing officer from Oldman Council to pass him on a driving test that he had failed. In December 2012 Mushtaq was given a two month custodial sentence, suspended for 12 months and a two month curfew order.[27] Finally, in April 2013 Li Yang, a postgraduate student was convicted of attempting to bribe his university professor after he had failed his dissertation. The defendant pleaded guilty to bribery and possessing an imitation firearm and was sentenced to a custodial sentence of 12 months.[28]

*Financial Regulation*

In addition, and perhaps instead of, criminal liability, the Financial Conduct Authority also has the power to impose civil fines under section 206(1) of the Financial Services and Markets Act 2000.[29] The use of this was seen in July 2011, when the FSA (as it was then) fined Willis Limited £6.895 million for weaknesses in its anti-bribery and corruption systems and controls.[30] The FSA, in 2011, also fined Aon Limited £5.25 million for 'failing to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption associated with making payments to overseas firms and individuals'[31]. Here, the FSA determined that Aon Ltd had 'failed to properly assess the risks involved in its dealings with overseas firms and individuals who helped it win business and failed to implement effective controls to mitigate those risks'. [32] More recently, the FCA fined JLT Speciality Limited £1.8 million for an 'unacceptable approach to bribery and corruption risks from overseas payments'.[33] The FCA concluded that the company 'was found to have failed to conduct proper due diligence before entering into a relationship with partners in other countries who helped JLT Speciality Limited secure new business, known as overseas introducers. JLT Speciality Limited also did not adequately assess the potential risk of new insurance business secured through its existing overseas introducers'.[34] Furthermore, in 2014, the FCA fined Besso Limited £315,000 for 'failing to take reasonable care to establish and maintain effective systems and controls for countering the risks of bribery and corruption'.[35] The FCA concluded 'Besso failed to ensure that they had proper systems and controls in place to counter the risks of bribery and corruption in their business activities'.[36]

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27 http://www.thelawpages.com/court-cases/Mawia-Mushtaq-11023-1.law

28 http://www.thelawpages.com/court-cases/Yang-Li-10957-1.law

29 J. Horder, 'Bribery as a form of criminal wrongdoing' (2011) Law Quarterly Review, 127(Jan), 37-54, 43.

30 Financial Services Authority 'FSA fines Willis Limited 6.895m for anti-bribery and corruption systems and controls failings', (21 July 2011), <http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/066.shtml> accessed 24 November 2011.

31 Financial Services Authority 'FSA fines Willis Limited 6.895m for anti-bribery and corruption systems and controls failings', (21 July 2011), <http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/066.shtml> accessed 24 November 2011.

32 Financial Services Authority 'FSA fines Willis Limited 6.895m for anti-bribery and corruption systems and controls failings', (21 July 2011), <http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/066.shtml> accessed 24 November 2011.

33 Financial Conduct Authority 'Firm fined £1.8million for 'unacceptable' approach to bribery & corruption risks from overseas payments', December 19 2013, available from https://www.fca.org.uk/news/firm-fined-18million-for-unacceptable-approach-to-bribery-corruption-risks-from-overseas-payments, accessed February 8 2016.

34 Financial Conduct Authority 'Firm fined £1.8million for 'unacceptable' approach to bribery & corruption risks from overseas payments', December 19 2013, available from https://www.fca.org.uk/news/firm-fined-18million-for-unacceptable-approach-to-bribery-corruption-risks-from-overseas-payments, accessed February 8 2016.

35 Financial Conduct Authority 'Besso Limited fined for anti-bribery and corruption systems failings', March 19 2014, available from https://www.fca.org.uk/news/besso-limited-fined-for-antibribery-and-corruption-systems-failings, accessed February 8 2016.

36 Financial Conduct Authority 'Besso Limited fined for anti-bribery and corruption systems failings', March 19 2014, available from https://www.fca.org.uk/news/besso-limited-fined-for-antibribery-and-corruption-systems-failings, accessed February 8 2016.

An important development in has been the creation of the Senior Management Certification Regime (SMCR) following the enactment of the Financial Services Act 2012. This could provide the FCA with an opportunity to overcome the problems associated with the identification doctrine, and assist in tackling corporate economic crime.[37] The SMCR has two objectives: to encourage all staff within the financial services sector to take responsibility for their actions and that authorised firms and employees can clearly illustrate where the responsibility lies. The SMCR provides that a corporation's senior management is responsible for the policies, systems and controls that are designed to reduce the threat posed by financial crime. Therefore, the SMCR places the obligation of the regulated corporations to limit the risk posed by financial crime on its senior management. The FCA is attempting to improve the culture within firms and is clearly placing the burden on senior managers to limit the risk posed by financial crime. Such efforts are to be welcomed, yet the extension to make senior managers accountable for a firm's financial crime obligations are from innovative and this 'new' initiative duplicates the existing obligations under the FCA. Nonetheless, financial crime related breaches of the SMCR by senior managers would enable the FCA and potentially prosecutors to identify a corporation's senior management who could meet requirements of the identification doctrine. This form of combined financial regulatory and criminal law response to financial crime breaches by corporations can be classified as a 'hybrid' approach and it would go some way to resolving the problems associated with the identification doctrine. This would be a novel step in the UK's efforts to tackle corporate financial crime, but it would require a more joined-up approach between the FCA and prosecutorial agencies.

**7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?**

In addition to the usual criminal options, the Crime and Courts Act 2013 provides the SFO with an important weapon in its armoury against those companies who fail to prevent bribery under s. of the Bribery Act 2010. Under s. 45 of the 2013 Act,[38] the SFO or the Director of Public Prosecutions (DPP) is permitted to use a Deferred Prosecution Agreement or DPA.[39] The Crime and Courts Act 2013 states that 'persons who may enter into a DPA with a prosecutor' can be divided into three categories including a company, a partnership or an unregistered organisation.[40] It is important to note, that DPAs are *not* available to individuals. A DPA is a contractual agreement between a financial regulatory agency or government agency and a corporation, who is under investigation for breaching the law. The main purpose of a DPA is to permit the offending corporation to illustrate good conduct, to cooperate with the investigating agencies, pay a fine and improve its internal corporate governance procedures. The first DPA used was seen in *Serious Fraud Office v Standard Bank Plc* in November 2015. Here, Standard Bank Plc was accused of breaching s. 7 of the Bribery Act 2010 and the proceedings were stopped once the use of the DPA was approved by the courts. As a result of this decision, Standard Bank agreed to pay financial orders totalling $25.2m, an additional $7m to the Tanzanian government and SFOs costs totalling £330,000.[41] It is worth noting that Standard Bank Plc was not criminally convicted of bribery or corruption offences. This was followed by a second DPA against XYX Ltd who agreed to 'pay financial orders of £6.5m, comprised of a £6.2m disgorgement of gross profits and a

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[37] The leading authority on the doctrine of criminal liability of corporations is the House of Lords decision in *Tesco Supermarkets v Nattrass* [1972] AC 153.
[38] Crime and Courts Act 2013, s. 45
[39] Crime and Courts Act 2013, s. 45 Schedule, 17. 3.
[40] Crime and Courts Act 2013, s. 45, schedule 4(1).
[41] Serious Fraud Office 'SFO agrees first UK DPA with Standard Bank' November 30 2015, available from https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/, accessed February 26 2016.

£352,000 financial penalty'.[42] In 2017, Rolls-Royce agreed to enter into a DPA that 'involve[d] payments of £497m. . . [and] Rolls-Royce [were] also reimbursing the SFO's costs in full'.[43] In April 2017, the SFO announced that it had entered into a DPA with Tesco which was required to pay a fine of £129 million for overstating its profits.[44] Interestingly, in each of the four DPAs obtained by the SFO, no criminal prosecutions have been brought against any of the offending corporation's employees or agents, thus drawing similar comparisons with the recent use of DPAs in the United States of America (US). This is not surprising given the initial lack of enthusiasm shown by the SFO and Crown Prosecution Service towards prosecuting individuals under the Bribery Act 2010. It is somewhat disappointing that no prosecutions have been brought in each of the four DPAs agreed between the corporations and the SFO, thus similarities exist between the approach in the US and the UK. If prosecutions were pursued against the employees or agents by the SFO for breaches of the Bribery Act 2010, it would represent an additional form of deterrent and would go some way to avoid any more 'profound apologies' from offending corporations.[45]

**Conclusions**

- The UK's efforts to tackle financial crime concentrated on targeting individuals as opposed to corporations. The unsatisfactory nature of this stance, led to the introduction of the failure to prevent bribery corporate offence. This has secured several DPAs against corporations, but there have been no bribery related prosecutions pursued in conjunction. This position is unsatisfactory.
- DPAs must be used in conjunction with criminal proceedings against employees and/or agents of corporations if they are to have a deterrent effect to reduce future misconduct.
- The introduction of the SMCR by the FCA is the most significant mechanism that could be used to overcome the restrictive interpretation of the doctrine of corporate criminal.
- By placing the management of financial crime control within the remit of a corporation's 'senior management', this will allow the courts to identify the person who within a corporate structure meets the controlling mind test. The ability to recognise the person who has the controlling mind could go some way to redress this problem.
- In order for this approach to be adopted, it would require the FCA to liaise with the SFO and other prosecutors to implement this innovative mechanism. The ability of the FCA to instigate financial penalties draws unfavourable comparisons with the provisions in the USA.
- The UK should introduce legislation based on the Financial Institutions Reform, Recovery and Enforcement Act 1989. Such above would provide the FCA and other related enforcement agencies with the ability to pursue a series of civil actions against corporations for financial crime.

In addition to these suggestions, the Select Committee may be interested some of these research publications that provide a more in-depth commentary on the Bribery Act 2010:

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42 Serious Fraud Office, SFO secures second DPA (8 July 2016). Available at: https://www.sfo.gov.uk/2016/07/08/sfo-securessecond-dpa/ (accessed 5 August 2017).

43 Serious Fraud Office, Rolls-Royce PLC (11 September 2014). Available at: https://www.sfo.gov.uk/cases/rolls-royce-plc/ (accessed 5 August 2017).

44 Serious Fraud Office, SFO agrees Deferred Prosecution Agreement with Tesco (April 2017). Available at: https:// www.sfo.gov.uk/2017/04/10/sfo-agrees-deferred-prosecution-agreement-with-tesco/ (accessed 18 January 2018).

45 See Ryder, N. 'Too scared to prosecute and too scared to jail? A critical and comparative analysis of enforcement of financial crime legislation against corporations in the United States of America and the United Kingdom (2018) Journal of Criminal Law, 82(3), 215-233.

- Ryder, N. The Law Relating to Financial Crime in the United Kingdom (Routledge, 2016, 288 pp), 2nd Ed., with Harrison, K, chapter 7.
- Ryder, N. 'Too scared to prosecute and too scared to jail? A critical and comparative analysis of enforcement of financial crime legislation against corporations in the United States of America and the United Kingdom (2018) Journal of Criminal Law, 82(3), 215-233.
- Ryder, N. 'The Financial Crisis and Financial Crime in the United Kingdom: a critical analysis of the response by Financial Regulatory Agencies', (2017) Company Lawyer, 38(1), 4-14.
- Ryder, N. 'The Legal Mechanisms to control Bribery and Corruption'. *In*: Rider, B. (eds) *Research Handbook on International Financial Crimes*, Edward Elgar: Cheltenham, forthcoming, 2015, 381-393.
- Ryder, N. *White Collar Crime and Risk: Financial Crime, Corruption and the Financial Crisis.* (Palgrave: 2018), chapters 2 and 3.

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