

MAKEPOVERTYHISTORY

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Submission to the Senate Legal and Constitutional Committee on the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009*

Make Poverty History and Micah Challenge welcome this opportunity to make submission regarding the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009*. Our interest is in the increased penalties for the bribery of foreign public officials contained within Schedule 8 of the Bill and this submission will confine itself only to consideration of Schedule 8. Both campaigns support these increased penalties for both individuals and body corporates believing the existing penalties for this offence have been inadequate to act as an effective deterrent to bribery being carried out. Both Make Poverty History and Micah Challenge urge that Schedule 8 of the Bill is passed into law without any weakening of the proposed penalties.

Providing adequate penalties for the bribery of foreign public officials is one step in combating corruption which is a factor in efforts to eradicate poverty globally.

The Australian Parliament's consideration of this issue comes at an important time, as Transparency International has expressed concern that a number of States Parties to *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* are backsliding on their commitments. They expressed the view that some governments have acted to curtail the ability of investigative magistrates to bring cases, shorten statutes of limitations and extend immunities from prosecution.¹ The Australian Parliament needs to send a strong message to the international community that it remains committed to fighting corruption globally and ensuring that Australians and Australian companies do not engage in corruption.

Assessments that Australia needs to increase the penalties for Bribery of Foreign Public Officials

In April 2006 Make Poverty History published the report *Can aid be effective when corruption is present?* which included in its recommendations a request that the Australian Government:

Increases penalties for Australian companies found guilty of bribing foreign governments and implements better systems for detecting foreign bribery transactions when conducting ATO tax audits.

¹ Transparency International, "OECD Anti-Bribery Convention. Progress Report 2009", 2009, p. 6.

In March 2008, Micah Challenge endorsed the report, *From Corruption to Good Governance*, which outlined Australia's performance in tackling corruption and what further actions could be taken. The report was also endorsed by Transparency International Australia. The report recommended increasing penalties 30-fold for Australian companies and individuals found guilty of bribing foreign governments and officials and ensure that those found guilty are denied access to public contracting opportunities (particularly through Australia's aid program).

In its 2006 assessment of Australia's compliance with the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business*, the OECD's Directorate for Financial and Enterprise Affairs urged that corporate fines for bribery be increased from the current maximum of A\$330,000².

In June 2009 Transparency International published its annual assessment of countries' compliance with the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business*. The report showed that just four of 36 countries that are party to the Convention actively enforce its provisions. Australia was not amongst them. The four countries were Germany, Norway, Switzerland and the USA.

Transparency International assessed that the low level of active enforcement was primarily due to a lack of political will.

Australia was criticised in the report for lacking adequate fines for those found guilty of paying bribes in to foreign officials. The report also assessed that Australia had inadequate protection for whistleblowers both in government and in the private sector.

The Impact of Corruption on undermining efforts to reduce Poverty Globally

Transparency International in a report issued in 2006 found that corruption was undermining progress towards achievement of the Millennium Development Goals, especially those related to reducing child mortality, improved maternal health and the fight against HIV/AIDS, malaria, TB and other diseases.³ A study carried out by the International Monetary Fund (IMF) using data from 71 countries showed that countries with high indices of corruption systematically have higher rates of infant mortality. Preventing abuse and reducing corruption therefore is important to increase resources available for health, to make more efficient use of existing resources and, ultimately, to improve the general health status of the population.⁴

² OECD, Directorate for Financial and Enterprise Affairs, 'Australia: Phase 2. Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions', 4 January 2006.

<http://www.oecd.org/dataoecd/57/42/35937659.pdf>

³ Transparency International Media Release, "Theft, bribery and extortion rob millions of proper healthcare, says Global Corruption Report 2006", 1 February 2006.

⁴ Carin Norberg and Taryn Vian, "Corruption in the Health Sector", U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute, 2006, p.3.

Transparency International (TI) found that in the Philippines a 10% increase in the extortion of bribes by medical personnel resulted in a reduction in the child immunisation rate by up to 20%.⁵ This is not simply an internal problem for developing countries, but there are cases of foreign companies paying bribes to promote their products into health systems at the expense of public health. The International Code Documentation Centre of the International Baby Food Action Network (IBFAN) continues to document infant formula and baby food companies giving 'gifts' to health professionals as thinly veiled bribes to get health professionals to get mothers to feed their babies the company's products.⁶ There was a media report of a company in the Philippines paying \$13 to health professionals for every ten babies they signed up to their products. Undersecretary of the Philippines Ministry of Health, Alex Padilla, was reported in the media as saying that new mothers have often been given infant formula by doctors and midwives in the hospitals, on commission from the milk formula companies.⁷ An estimated 16,000 babies lives were lost each year in the Philippines because they are not adequately breastfed before the recent tightening up of laws restricting the marketing activities of infant formula companies in the Philippines. Infant formula sales in the Philippines were over \$1 billion a year before the new marketing restrictions were introduced.⁸

TI has found that aggressive marketing techniques buy physicians' support for specific drugs, leading to a high rate of prescriptions that are not always based on patient need. Corruption underpins a lucrative counterfeit drugs trade. Payoffs at every step of the chain smooth the flow of counterfeit drugs from their source to the unwitting consumer. In many developing countries pharmaceuticals make up 50 – 90% of household health expenditure, meaning that corruption in the pharmaceutical industry has a direct and painful impact on people struggling for survival.⁹

Bribery Globally

The World Bank estimates that US\$1 trillion is paid in bribes each year globally.¹⁰ Transparency International has been concerned that corruption in developing countries was sustained by bribes paid by Western countries. A 1997 estimate of bribes paid by international companies to do business in developing countries put the figure at US\$80 billion per year paid in bribes, more than the total overseas aid to these countries at the time.¹¹ The World Bank and UN estimate that corrupt money associated with bribes received by public

⁵ Transparency International Media Release, "Theft, bribery and extortion rob millions of proper healthcare, says Global Corruption Report 2006", 1 February 2006.

⁶ See for example Yeong Joo Kean and Annelies Allain, 'Breaking the Rules, Stretching the Rules 2004', International Baby Food Action Network, May 2004.

⁷ Connie Levett, 'Baby formula battle goes to Manila court', *The Age*, 3 February 2007, p. 20.

⁸ World Health Organisation, Philippines.

⁹ Transparency International Media Release, "Theft, bribery and extortion rob millions of proper healthcare, says Global Corruption Report 2006", 1 February 2006.

¹⁰ Penny Jackson, 'The Other Side of the Coin. The UK and Corruption in Africa', Africa All Party Parliamentary Group, March 2006, p. 12.

¹¹ Rose-Ackerman, S., 'The Political Economy of Corruption' in K. Elliott (ed.), *Corruption and the Global Economy*, Institute for International Economics, Washington, 1997.

officials of developing and transition countries is conservatively put at US\$20 – US\$40 billion a year, a figure supported by Transparency International in their 2009 report.¹²

Transparency International's *Global Corruption Report 2009* has found that business continues to play a very exposed role as the supplier of corrupt payments to civil servants, members of government and political parties. Kickbacks may be actively solicited, extorted or offered proactively. Irrespective of the degree of coercion involved, the fact remains that bribery fosters a culture of impunity and repeat corruption, undermines the functioning of public institutions and fuels a public perception that governments and bureaucracies are up for sale to the highest bidder.¹³

TI stated in the 2009 report that:¹⁴

The scale and scope of bribery in business is staggering. Nearly two in five polled business executives have been asked to pay a bribe when dealing with public institutions. Half estimated that corruption raised project costs by at least 10%.

TI states that the cost is measured in more than money as when bribes allow reckless companies to disregard the law, the consequences range from 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. Even facilitation payments are found to be harmful, as they are funnelled up through the system and help nurture and sustain corrupt bureaucracies, political parties and governments.¹⁵

In some cases, wealthy countries have been slow or reluctant to act on issues of bribery in developing countries. For example, the OECD has criticised the UK Government for taking into consideration the possible impact on the UK economy, or its relations with other states, before being willing to take forward a bribery case.¹⁶ In fact, there has not been a single prosecution of a UK company in the UK for bribery of a public official a developing country.

By contrast the US provides a far more positive model of dealing with foreign bribery, the *Foreign Corrupt Practices Act 1977* makes it illegal for any US-based or US-listed company to engage in foreign bribery. It extends to foreign companies that issue their stock in the US. The US Department of Justice and the Securities and Exchange Commission are reported to have doubled the number of investigations they are conducting into overseas bribery in the last year. From 1995 to 2000, the US Department of Justice averaged less than one completed investigation a year. Early in 2007, three subsidiaries of Vetco, a UK oil and gas provider, paid US\$26 million in penalties for having paid US\$21 million in bribes to Nigerian officials.¹⁷ In 2008, the US initiated 21 cases and 81 investigations. The US has increasingly

¹² Transparency International, 'Global Corruption Report 2009: Corruption and the Private Sector', p. xxv.

¹³ Transparency International, 'Global Corruption Report 2009: Corruption and the Private Sector', p. xxv.

¹⁴ Transparency International, 'Global Corruption Report 2009: Corruption and the Private Sector', p. xxv.

¹⁵ Transparency International, 'Global Corruption Report 2009: Corruption and the Private Sector', p. xxv.

¹⁶ Penny Jackson, 'The Other Side of the Coin. The UK and Corruption in Africa', Africa All Party Parliamentary Group, March 2006, p. 31.

¹⁷ Patti Waldmeir, 'US cracks down on global bribery', *The Australian*, 11 April 2007.

focused on violations by foreign companies, with 13 of the 29 new investigations during 2007 involving foreign companies.¹⁸

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¹⁸ Transparency International, 'OECD Anti-Bribery Convention. Progress Report 2009', 2009, p. 53.