

Written evidence submitted by Spotlight on Corruption (VIC0050)

About Spotlight on Corruption

1. Spotlight on Corruption¹ (“Spotlight”) is an anti-corruption charity that works to ensure the UK has strong anti-corruption laws which are robustly enforced, alongside pro-active implementation of anti-corruption policies, in order to reduce impunity for grand corruption globally, drive out dirty money from the UK and its dependent territories, and recover more corrupt assets which can be returned to their countries of origin and used to benefit the victims of corruption.
2. We build our evidence base through detailed research, particularly by monitoring the UK’s enforcement bodies and court cases arising from the UK’s anti-corruption laws. From this monitoring, we develop the case for policy and legislative reform to address weak enforcement and poor implementation of the law.

The scope of this submission

3. We provide this evidence in answer to Question 12 of the Terms of Reference for the Justice Committee’s inquiry: “Whether there should be any further measures included in the Bill?”
4. The aim of our contribution is to highlight a critical oversight in the Victims Bill which will need to be addressed if the bill is to achieve the government’s stated aim of “delivering a cultural shift in victims’ experiences by putting their interests at the heart of the justice system”. This concerns the need to ensure the representation and compensation of victims of international corruption in UK court proceedings.
5. This submission covers:
 - 5.1. The UK’s stated commitment to compensating the victims of corruption
 - 5.2. The under-implementation of the 2018 Compensation Principles
 - 5.3. The obstacles to compensating the victims of corruption
 - 5.4. The lessons learned from corruption cases
 - 5.5. The proposed further measures that should be included in the Victims Bill

The UK’s stated commitment to compensating the victims of corruption

¹ See our website: <https://www.spotlightcorruption.org/>

6. As a State Party to the United Nations Convention Against Corruption (UNCAC), the UK is required to ensure the views of victims are considered in criminal proceedings;² to enable those who have suffered damage from corruption to take legal action to obtain compensation;³ to permit UK courts to order compensation or damages to another State party harmed by corrupt offences;⁴ and to give “*priority consideration*” to returning confiscated proceeds of corruption to a State that requests it or its legitimate owners or to “*compensating the victims of the crime*”.⁵
7. In 2018, UK law enforcement bodies (specifically the SFO, CPS and NCA) adopted “General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases” (“Compensation Principles”).⁶ These Compensation Principles were developed after the London Anti-Corruption Summit in May 2016, where the UK committed to working with nine other countries on principles for compensation payments and financial settlements to be made “*safely, fairly, and in a transparent manner to the countries affected*” as “*an important method to support those who have suffered from corruption*”.⁷
8. The UK has also taken a proactive role in developing global principles for how stolen assets should be returned to origin countries in a transparent manner that will ensure they are not lost again to corruption, as set out at the Global Forum on Asset Recovery (GFAR) in December 2017. In January 2022, the UK announced its new “Framework for transparent and accountable asset return”,⁸ becoming the first country in the world to publish its policy for returning the proceeds of crime.⁹ These principles on asset return are relevant to how compensation should be returned to the victims of corruption.¹⁰

The under-implementation of the 2018 Compensation Principles

9. Over the last four years, Spotlight has monitored the implementation of the 2018 Compensation Principles to assess how effectively they have been utilised in practice to ensure that the victims of corruption are able to benefit from asset recovery proceedings and compensation orders made in England and Wales. It is clear that the Compensation Principles have not managed to ensure victims of corruption are compensated, with their

² Article 32 of the UNCAC

³ Article 35 of the UNCAC

⁴ Article 53(b) of the UNCAC

⁵ Article 57(3c) of the UNCAC

⁶ <https://www.cps.gov.uk/sites/default/files/documents/publications/General-Principles-to-compensate-overseas-victims-December-2017.pdf>

⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522791/FINAL_-_AC_Summit_Communique_-_May_2016.pdf

⁸ <https://www.gov.uk/government/publications/framework-for-transparent-and-accountable-asset-return>

⁹ <https://www.gov.uk/government/news/uk-sets-global-transparency-standard-for-asset-returns>

¹⁰ See further <https://www.spotlightcorruption.org/the-uks-new-framework-for-transparent-and-accountable-asset-return-putting-this-global-precedent-into-perspective-and-into-practice/>

introduction in 2018 having led to no discernible change in approach since 2015, when the SFO, CPS and NCA operated on the basis of similar informal principles for compensation.

10. Since 2015, compensation has only been granted for victims of overseas corruption in a small handful of cases. Despite compensation forming a key part of the Deferred Prosecution Agreement (“DPA”) regime introduced by the Crime and Courts Act 2013,¹¹ compensation has only ever been given in 2 DPAs, and the amounts returned to countries of origin were very low:

- 10.1. In November 2015, the first DPA was entered into by the SFO in which Standard Bank was fined US\$25.2 million and required to pay the Government of Tanzania a further US\$7 million in compensation.¹² This figure reflected the amount that the Government of Tanzania lost directly as a result of the corruption.

- 10.2. In the DPA that the SFO entered into with Amec Foster Wheeler in July 2021, the company was required to pay a financial penalty and costs amounting to £103 million in the UK, yet only £210,610 was paid as compensation to the people of Nigeria.¹³

11. In the first contested overseas bribery case, *Smith and Ouzman*,¹⁴ no court order for compensation was made but, on the SFO’s initiative, the bribe amount of approximately £395,000 was paid to Kenya out of funds confiscated from the company.

The obstacles to compensating the victims of corruption

12. Although criminal courts are obliged to consider the question of compensation after conviction,¹⁵ the bar for achieving compensation orders is high. The case law has held that compensation is only intended for “*clear and simple cases*”,¹⁶ also described as “*the simple, straightforward case*”.¹⁷
13. A crucial aspect hindering the award of compensation for overseas corruption is the complexity of both identifying and quantifying the loss suffered by victims of corruption.

¹¹ <https://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted>. The DPA Code of Practice stipulates that it is “*particularly desirable that measures should be included [in the terms of the DPA] that achieve redress for victims, such as payment of compensation*”.

¹² *Serious Fraud Office v Standard Bank Plc* (U20150854): https://www.judiciary.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf

¹³ *Director of the Serious Fraud Office v Amec Foster Wheeler Energy Limited*: <https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities/>

¹⁴ *R v Smith, Smith and Smith & Ouzman Ltd* (7 January 2016): https://docs.wixstatic.com/ugd/54261c_9dabc24c7c134274ba0a96c3cd7e6c52.pdf

¹⁵ Section 130 of the Powers of Criminal Courts (Sentencing) Act 2000

¹⁶ *R v Michael Brian Kneeshaw* (1974) 58 Cr App R 439

¹⁷ *R v Kenneth Donovan* (1981) 3 Cr App R (S) 192

The courts have therefore held that compensation will not be awarded “*where there are real issues as to whether those to benefit have suffered any, and if so, what loss*”.¹⁸

14. There are numerous examples of where these difficulties in establishing and quantifying the harms of corruption have left the victims of corruption without any compensation.

- 14.1. In the Smith and Ouzman case, the SFO did not positively pursue compensation, but the judge explained that he would in any event have declined to order it:

*“In any event I have not had proper evidence put before me of a formal request for compensation from a victim, nor have I any idea whether the respective governments have taken steps to recover the sums from their own officials. I am also uncertain as to who the compensatee should be and whether in making such an order I can be confident that the sum will reach the right entity. I would have declined to make a compensation order.”*¹⁹

- 14.2. In the XYZ case, Sir Brian Leveson P found that “*the SFO is not able to demonstrate whether and, if so, in what sum, the various XYZ agents actually paid bribes to named or unknown individuals. Taken together, these factors amount to it not being possible to positively identify any entities as victims who may be compensated*”.²⁰

- 14.3. In the Rolls Royce case, Sir Brian Leveson P offered similar reasons for declining to order compensation. He explained that “*the factual complexity of the totality of the allegations in the Statement of Facts, including the use of intermediaries, makes quantifying bribes actually paid impossible*” and therefore concluded that “*the SFO has not been able to identify a quantifiable loss arising from any of the criminal conduct which it is proposing to resolve*.”²¹

The lessons learned from corruption cases

The bar for achieving compensation orders is high

15. The emerging case law discussed above indicates that the complexity of a case can be a significant barrier to achieving compensation in overseas corruption cases.
16. Compensation is less likely to be sought or unlikely to be granted by a court (whether in a DPA or otherwise) where:

¹⁸ *R v Ben Stapylton* [2012] EWCA Crim 728

¹⁹ *R v Smith, Smith and Smith & Ouzman Ltd* (7 January 2016) page 6:
https://docs.wixstatic.com/ugd/54261c_9dabc24c7c134274ba0a96c3cd7e6c52.pdf

²⁰ *Serious Fraud Office v XYZ* 2016 (U20150856) para 41

²¹ *Serious Fraud Office v Rolls-Royce Plc* 2017 (U20170036) paras 83-84: <https://www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf>

- 16.1. the bribery is widespread and global;
 - 16.2. the bribery is routed through intermediaries and payment to specific individuals is not established;
 - 16.3. where there is no evidence of an inflated contract or substandard/unwanted product and direct loss cannot therefore be established;
 - 16.4. there has been no compensation request from an affected party or no contact established with authorities in an affected country;
 - 16.5. it is not clear to whom the compensation should be paid (this is particularly an issue if bribes were paid to state-owned enterprises or sub-state bodies).
17. One potential undesirable effect of this is that the more egregious the bribery and corruption, the less likely it is that a company will be required to pay compensation.

The voice of victims of any definition is generally absent from overseas corruption cases

18. Despite the requirement in the UNCAC for State parties to enable victims to have their views presented and considered at appropriate stages in criminal proceedings,²² there is no precedent for this occurring in overseas corruption cases in the UK. There is no doubt that this is made difficult by the complex nature of identifying who is the victim of corruption. In general, UK courts only recognise states or competitors as victims in overseas corruption cases. Judges have remarked on various occasions, however, that the real victims are the people of the country from whom assets have been stolen through bribery and corruption.
19. The absence of victim representation in overseas corruption cases means that juries and judges are far more likely to hear detailed evidence of the good character of a defendant than of the impact of the offending. In the Smith and Ouzman case, letters from an NGO Coalition and expert statements were put before the judge but rejected on the grounds that as it was well known that corruption causes harm, the statements did not add anything.

Quantification of loss and harm has generally been on a narrow basis

20. Overall, a very narrow approach to quantifying the loss caused by corruption has been taken in UK courts to date, with loss being limited to the amount of the bribe paid. The

²² Article 32 of the UNCAC

only exception to this so far has been achieved through a guilty plea by the company. Quantification of harm which impacts on the amount of fine is limited to gross profit from the contract obtained by a company.

21. It is anomalous that for individuals convicted of bribery, the harm can be calculated in a much broader fashion. According to the definitive guideline issued by the Sentencing Council, the harm of bribery can be demonstrated by a range of factors, including:²³
 - 21.1. Serious detrimental effect on individuals (for example by provision of substandard goods or services resulting from the corrupt behaviour);
 - 21.2. Serious environmental impact;
 - 21.3. Serious undermining of the proper function of local or national government, business or public services;
 - 21.4. Substantial actual or intended financial gain to offender or another or loss caused to others.

Proposed further measures that should be included in the Victims Bill

A broader assessment of the harms of corruption

22. If the Compensation Principles are to be utilised effectively to ensure the victims of corruption are compensated, courts need to be both empowered and mandated to undertake a broader assessment of the harms of corruption. Rather than confining compensation to “clear and simple cases”, the assessment of harm should accommodate the complexities of corruption cases in which issues of causation and loss cannot be established on the basis of the general liability rules.
23. To achieve this, the Victims Bill should implement the following measures:
 - 23.1. Changes to Chapter 2 of the Sentencing Act 2020 (the Sentencing Code) to enable a broader assessment of the harm of corruption to be undertaken in relation to compensation orders for corporate offending. This assessment should reflect not just the bribe paid and any direct financial loss but also the broader social damage suffered as a result of corruption.

²³ <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/bribery/>

- 23.2. This assessment of harm must be given a full hearing at sentencing stage, following a process that enables the views of victims to be represented and considered in court as set out below.

Enhancing the recognition and representation of victims

24. The Victims Bill should fulfill the UK's obligation under Article 32 of the UNCAC to ensure the victims of corruption have their views presented and considered at appropriate stages in criminal proceedings. Importantly, this should include a recognition that states are not the only victims of corruption, but also ordinary people and affected communities.
25. To achieve this, the Victims Bill should implement measures:
 - 25.1. Allowing foreign states to make representations and present evidence of harm to court, both in criminal convictions and in relation to DPAs.
 - 25.2. Allowing impact statements to be submitted to the court from non-state actors, including victim impact statements, community impact statements, and expert witness statements.

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