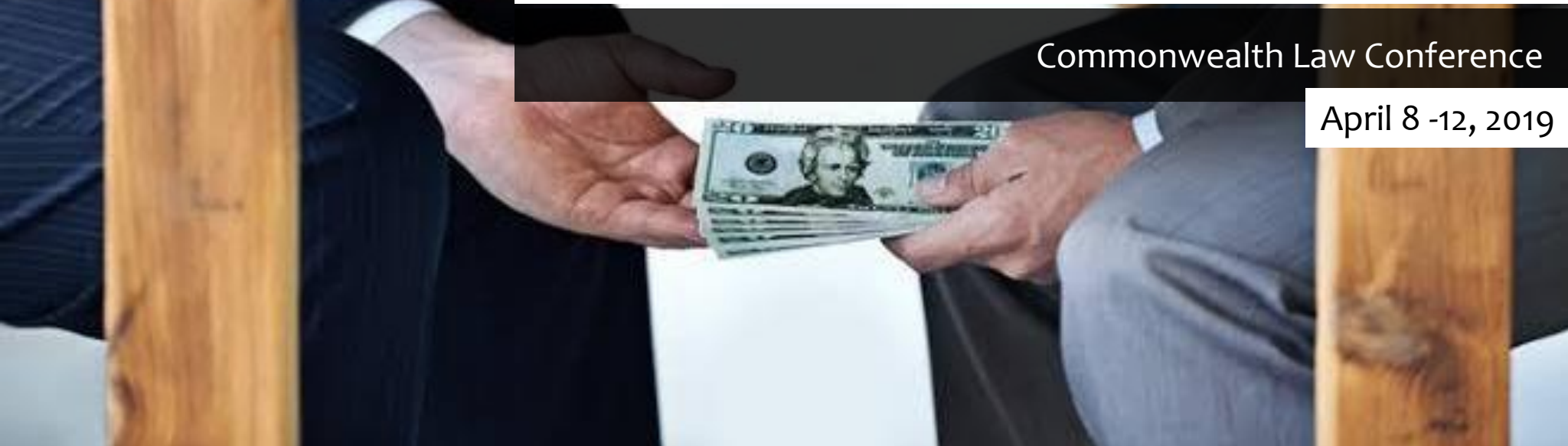




‘Mind the gap!’: Lawyers, Ethics and Policing Bribery

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Presentation Overview

Background

Defining and Proscribing Bribery

Lawyers Behaving Badly: Lawyers and corruption

Recommendations and Conclusion

Defining Bribery

- Bribery describes (i) the payment of money or the giving of property or favours to a public official as an inducement to act or refrain from acting in the performance of his public function; (ii) the solicitation or acceptance of money or property or favours by a public official so that he will act or refrain from acting in the performance of his public function.
- The term is often described in international and domestic instruments as an 'act of corruption'.
- Commercial bribery or private sector bribery.
- What constitutes bribery depends on the meaning it is given in the legislation creating the offence.
- Here we are focused on active or supply side bribery.



Defining Bribery: the International and Domestic Anti-corruption Toolkit

Global instruments

- ✓ FCPA 1997 – prohibits supply side bribery of foreign public officials, allows facilitation payments.
- ✓ UK Bribery Act 2010- creates a strict liability offence for companies that fail to prevent bribery.
- ✓ OECD Convention 1999 – addresses supply side bribery of foreign public officials.
- ✓ UNCAC 2003 – addresses both supply side and demand side

bribery of foreign public officials.

- ✓ IACAC- 1996 – addresses supply side bribery of foreign public officials.

Domestic law in the CC –

- Prevention of Corruption Acts - modelled off the old English legislation.
- Criminalises domestic bribery and supply side bribery of a foreign public official.

Defining Bribery: International Instruments

UN Convention Against Corruption (UNCAC)

- Both Jamaica and the Bahamas have ratified the UNCAC.
- Art. 15 requires State parties to criminalise the direct or indirect domestic bribery of public officials.
- Art. 16 requires State parties to criminalise the **direct or indirect bribery of foreign officials and officials of public international organisations** ‘in order to obtain or retain business or other undue advantage in relation to the conduct of international business’.
- Art. 16(2) requires State parties to consider criminalising **demand side bribery by a foreign public official**.
- Provides a wide definition for ‘foreign public official’ - Art. 2(b).

Defining Bribery: Domestic Legislation

The Bahamian and Jamaican Bribery provisions

Corruption (Prevention) Act Jamaica 2001:

- ✓ Criminalises both domestic (s. 14(1) and transnational bribery of public officials s. 14(4) as ‘acts of corruption’.
- ✓ The wording is very similar to that of the IACAC.
- ✓ It retains the language of the old UK Prevention of Corruption legislation – the use of ‘acts of corruption’ and ‘corruptly’.
- ✓ Criminalises active bribery by intermediaries.

Prevention of Bribery Act 1976 and the Penal Code:

- ✓ Criminalises both domestic (ss. 3, 4 & 7) and transnational bribery of public officials (s.3A) as ‘acts of corruption’.
- ✓ Criminalises bribery in the private sector.
- ✓ Avoids the use of ‘acts of corruption’ and ‘corruptly’.
- ✓ Provides a broad definition of ‘advantage’.
- ✓ Addresses bribery in procurement matters (s.4(1)) and excludes facilitation payments (s. 3B).
- ✓ Criminalises bribery in the private sector

'Mind the Gap': Lawyers and Bribery

- IBA, OECD and the UNODC joint survey, 'Risks and threats of corruption and the legal profession':
 - ✓ Surveyed 642 lawyers in 95 counties.
 - ✓ The survey was meant to alert readers 'to the unfortunate fact that lawyers are ... approached to act as agents/middlemen in transactions that could reasonably be suspected to involve international corruption.'
 - ✓ More than 50% of the respondents had never heard of the major international anti-corruption instruments.
 - ✓ 50% respondents said there was an issue of corruption among law firms in their jurisdiction.
 - ✓ Nearly 30% said they had lost business to corrupt law firms engaged in international bribery and corruption.

'Mind the Gap': Lawyers and Bribery

- Lawyers as transactional intermediaries
- Lawyers as gatekeepers ?
- ✓ To whom do lawyers owe duties.
- ✓ Should lawyers be treated as gatekeepers for the purpose of combating bribery?

Minding the Gap: Combating Bribery

Ethics and Professional Obligations

- No specific guidance is provided on bribery in Jamaica or the Bahamas.
- However, lawyers are bound to observe the codes of ethics that establish and enforce certain duties:
 - ✓ *The duty to maintain the integrity and dignity of the profession.*
 - ✓ *The duty to observe and maintain the rule of law.*
 - ✓ *The duty of confidentiality – LPP is sacrosanct but ...*

Minding the Gap: Combating Bribery

In-house Counsel: special considerations

- ✓ Employees but nevertheless bound by the ethical obligations.
- ✓ Per Lord Denning in ***Compton Amusement Machines Ltd. v. Commissioner of Customs and Excise (No. 2)*** [1972] 2 QB 102: ‘They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their clients and the court. They must respect the same confidence.’
- ✓ Be mindful that the client is the company and not its officers and directors.
- ✓ Maintain independence and professional objectivity.
- ✓ Advise on the drafting and enforcement of internal anti-corruption policies.
- ✓ ABA Model Rules

Recommendations and Conclusions

Practical Measures for Combating Bribery

- The role of the Bar – provision of more education in this area.
- Practical guidance is necessary regarding the operation of the Codes of Conduct *vis-a-vis* Bribery (cf. with the ABA approach).
- In-house counsel must avoid ‘toeing the party line’.
- Firms must pre-emptively address bribery risks by implementing anti-corruption policies.



Thank You

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