

Institution: University of Bristol
Unit of Assessment: 20 - Law
Title of case study: Changing the law on corporate bribery and corruption
1. Summary of the impact (indicative maximum 100 words) <p>Wells' research on corporate liability led to direct changes to UK law in the Bribery Act 2010 and has begun to have significant impact internationally. UK law now complies with the 1997 OECD Anti-Bribery Convention. Significant changes were made after Parliamentary scrutiny of the draft Bill, as a result of Wells' intervention, which have a major effect on all corporations, including multinationals, demonstrating the international reach and significance of this law. Her work has had further international reach and significance on the development of the OECD's Anti-Corruption Initiative and on the International Bar Association's Task Force (IBAHRI) on Tax Havens, Poverty and Human Rights.</p>
2. Underpinning research (indicative maximum 500 words) <p>Professor Celia Wells is a leading figure in the study of corporate criminal liability in the UK and internationally. Since appointment to the University of Bristol Law School in January 2009, she has produced a further body of theoretical work in the field of corporate criminal liability as well as in its application to the specific field of bribery ([1]-[5]), and for which she was awarded a Leverhulme research fellowship in March 2010 [6]. Her work straddles both domestic and international aspects of criminal law as well as the interrelation between them. In [1], she explored the interface between the regulation and deterrence of corporate crime, arguing that legal responses were incoherent, as they were torn between criminal deterrence and regulation via negotiated civil penalties.</p> <p>This analysis was then applied in order to draw attention to the failure of the UK government to comply with the OECD Anti-Bribery Convention's requirements in relation to corporate liability. Her critical commentary on the draft Bribery Bill 2009 ([3]) was submitted as Written Evidence to the Joint Parliamentary Scrutiny Committee.</p> <p>As regards corporate criminal liability for economic offences in general, Wells makes the innovative argument that the Serious Fraud Office's approach has shifted towards negotiation and settlement as if this is a regulatory infraction, by-passing the usual models of criminal law ([1]). Wells points out that on its face the Bribery Act 2010 is at odds with the better regulation rhetoric and the UK as providing a patchwork of answers to the difficult questions about regulatory-criminal law interactions. Indeed, she argues that although the corporate offence provision in the Bribery Act 2010 "talks" tough, it provides neither the full story (as corporations had been responding to international and other pressures for a good few years in any event) nor any direct key as to how it will be enforced ([4] and [5]). While the Serious Fraud Office announced in October 2012 that it has stepped back from the use of civil penalties (http://www.sfo.gov.uk/bribery--corruption/corporate-self-reporting.aspx), questions remain about the adequacy of its resources in supporting enforcement in the area of bribery and other economic crime. (http://www.sfo.gov.uk/about-us/our-views/other-speeches.aspx)</p> <p>A key element of Wells' programme of research since arriving at Bristol has been the development of a comparative approach to corporate criminal liability. The report she was commissioned to write for the Law Commission's consultation paper on corporate criminal liability (published as Appendix C) examines the different theoretical models underpinning corporate criminal liability ([2]). She notes – with agreement from the Law Commission itself – that "Somewhat paradoxically it has been in statutory interpretation rather than in the development of common law principles of attribution, that the courts have been most responsive to the social and economic context of business operations ... the variety in corporate form, reach and activity taken together with the extensive range of criminal laws require a flexible response in terms of corporate liability models" ([2]: Appendix C, para 100; CP, para 5.110).</p>

3. References to the research (indicative maximum of six references)

Outputs

- [1] Wells, C, 'Corporate Crime: Opening the Eyes of the Sentry', *Legal Studies*, **30**, (pp. 370-390), 2010. ISSN: 1748-121X. Listed in REF2.
- [2] Wells, C, *Corporate Criminal Liability: Exploring Some Models in Consultation Paper No 195, Appendix C*, for Law Commission of England and Wales, Stationery Office, 2010. http://www.lawcom.gov.uk/docs/cp195_web.pdf. Listed in REF2.
- [3] Wells, C, 'Bribery: Corporate Liability under the Draft Bill 2009', *Criminal Law Review*, (pp. 479-487), 2009. ISSN: 0011-135X. Listed in REF2.
- [4] Wells, C, 'Corporate Criminal Liability in England and Wales: Past, Present and Future', in M. Pieth & R. Ivory (Ed.), *Corporate Criminal Liability: Emergence, Convergence and Risk*, (pp. 91-112), Springer Science and Business Media B.V, 2011. ISBN: 9789400706736, chapter in peer reviewed edited collection. Can be supplied on request.
- [5] Wells, C, 'Who's Afraid of the Bribery Act 2010?' (2012) *Jnl of Business Law* 420-431. Listed in REF2.

Grant

- [6] Leverhulme Research Fellowship, *Regulating Corporate Financial Crime*, £17901, Awarded March 2010, Wells (Principal Investigator)

4. Details of the impact (indicative maximum 750 words)

There are two aspects to Wells' impact in this case study. The first concerns Wells' critique of the draft Bribery Bill 2009, which led to major changes in the formulation of the corporate offence. In itself this had international reach and significance as the offence affects multinational commercial organisations. The second impact, drawing additionally on her broader work on corporate criminal liability has led to her having a major influence on the work of the OECD and International Bar Association.

1. Direct impact on Bribery Act 2010

Wells' potent combination of detailed critique of the corporate offence in the draft Bill, together with recognition that the UK not seen as compliant by the OECD, prompted major substantive amendments to the Bill by means of a direct, linear change in the Bribery Act 2010. The scale and significance of the amendments can be shown by comparing cl.5(1) of the original draft Bill and s.7(1) as it became:

Cl.5(1): A ... commercial organisation ("C") is guilty ... under this section if – (a) a person ("A") performing services for or on behalf of C bribes another person, (b) the bribe was in connection with C's business, and (c) a responsible person, or a number of such persons taken together, was negligent in failing to prevent the bribe.

S.7(1): A ... commercial organisation ("C") is guilty of an offence ... if a person ("A") associated with C bribes another person intending - (a) to obtain or retain business for C, or (b) to obtain or retain an advantage in the conduct of business for C

These significant changes came about as a result of Wells' written and oral evidence (in May.2009) before the joint House of Commons/House of Lords legislative Scrutiny Committee, which she was invited to give because of her national and international expertise in the field [a]. She used [3] to argue that the corporate liability provision in the Bill was unnecessarily restrictive and complex; did not comply with the OECD convention; and unusually required both negligent failure to supervise and a lack of procedural due diligence ([a], Q115).

The Committee noted that Wells had "... played your role already behind the scenes in getting this

legislation into a draft form” ([a], Q75). She went on to play a further decisive role “behind closed doors”, when the Committee raised a further query by way of supplementary question asking whether “removing the requirement to prove negligence under clause 5 would be unfair to businesses and mark a step change from any comparable criminal offence (Qq 61-64).? Wells responded that “... the debate about corporate liability starts from the wrong foot or premise. A company’s liability for the acts of its employees is appropriate – and this is particularly applicable in the bribery context - because those acts benefit the company, those acts are undertaken with company resources (where does the money for the bribe come from? who signs the contracts? where do the profits end up? The answer in each case is ‘the business’) and companies are peculiarly equipped to supervise and monitor the acts of their employees and agents” [i].

The Committee accepted her arguments, noting “we are concerned by the focus on whether a ‘responsible person’ was negligent, rather than on the collective failure of the company to ensure that adequate anti-bribery procedures were in place. In our view, clauses 5 and 6 introduce a narrow and complex solution to a pressing problem. We therefore recommend the removal of the need to prove negligence under clause 5(1)(c)” [a], para 89. In adopting the Committee’s suggestions, the Government agreed “that there may be a risk that requiring the prosecution to prove negligence may involve unnecessary complexity and may have the potential to undermine the broad policy objectives of bringing about a shift away from a corporate culture that is more tolerant of bribery and promoting effective corporate anti-bribery procedures” [h], para 9. The requirement to prove negligence was removed.

Thus, there was a comprehensive re-drafting of the relevant provision which, subject to an adequate procedures defence, renders corporations liable for bribery offences by their employees and agents. Lord Goodhart, a member of that Committee, made the following observation regarding Wells’ contribution in the oral hearing ([a], Q112):

I found Professor Wells’ suggestion on how to deal with corporate offences very persuasive, namely that there should be vicarious liability with the company being liable for any bribery committed by anybody acting on their behalf with a due diligence defence...’.

The final report of the Joint Committee includes numerous citations to Wells’ evidence ([a]) and its recommendations, particularly as regards the corporate bribery offence, drew heavily on Wells’ evidence (eg at paras 41, 89-90, 103, 138). The final provisions of the Act therefore owe a considerable debt to Wells’ research as they reflect her specific critique and brought the UK into line with the OECD Convention as she had suggested. For example, Monty Raphael QC, General Counsel, Peters & Peters, who also gave oral evidence to the Committee, commented that

Were it not for your reworking of Clause 7 of the Bribery Bill 2010, it would not have received the Parliamentary support it did. Section 7 as it became is a testament to your scholarship and innovation, drawing upon your well deserved reputation as the authority on comparative corporate criminal responsibility. This section is destined to become the “offence of choice” for prosecutions in the area of corporate bribery. ([c])

The Chairman of the OECD Working Group on Bribery in International Business transactions has also noted how Wells “clearly influenced” the section of the Bribery Act 2010 so that it now complies with the requirements of the OECD’s Anti-Bribery Convention ([f]).

The international reach and significance of the corporate offence in the UK Bribery Act has triggered compliance responses from multinational corporations as a result of its reverse onus adequate procedures defence and because of its wide extra territorial effect. Companies are advised by Transparency International, among others, that compliance with the UK Act goes beyond that required under the US Foreign and Corrupt Practices Act 1977:

The Bribery Act ... presents heightened liability risks for companies, directors and individuals. To avoid corporate liability for bribery, companies must make sure that they have strong, up-to-date and effective anti-bribery policies and systems. [j]

2. Major influence on OECD and International Bar Association

Beyond this specific and direct contribution to impact on domestic legislation, Wells has significantly influenced the international agenda in other respects.

She has worked with the OECD to develop its Anti-Corruption Initiative in the corporate context. Corporate liability is unfamiliar to many of the 40 Anti Bribery Convention signatory states and her expertise formed the basis of discussion at the high-level, invitation-only event organised by the OECD across South East Asia in September 2010. This was attended by a range of government anti-corruption representatives and other non-academic policy-makers ([g]). The invitation was issued to Wells in reflection of her contribution to the foundation of the OECD approach to bribery and corruption: “*We believe that you would be able to give the members of the ‘Initiative’ an important basis for beginning their legislative work on legal persons’ liability under the UNCAC*” ([b]).

Finally, her impact extends to developments in international law in respect of corporate complicity in human rights violations and to the work of the International Bar Association’s Human Rights Institute’s Task Force on Tax Havens, Poverty and Human Rights. Wells was appointed a member of this international task force in 2012. Wells’ input occurred during the REF period and specifically used her research on remedies [1], [4] and [5] to develop the Task Force recommendations around corporate responsibilities. Thus, the research directly influenced the work of the Taskforce and her “... *input was of crucial importance ...*” and “... *has considerably shaped the Taskforce deliberations as well as the recommendations in the final report*”. In 2012, the Task Force met in London and, Dublin; in June 2012, Wells contributed to the high level multi-stakeholder consultation event in Latin America by leading the evidence and feedback sessions held by the Task Force ([e]). The stakeholder meeting included lawyers, representatives of international institutions, revenue administration and NGOs from Brazil, Colombia, Bolivia, Peru and Argentina. Wells’ presentation is an Appendix in the final Report.

5. Sources to corroborate the impact (indicative maximum of 10 references)

- [a] House of Lords/House of Commons Joint Committee on the Draft Bribery Bill, *Draft Bribery Bill*, HL 115, HC 430, London: TSO, 2009, *corroborates direct influence of Wells on s 7 Bribery Act 2010*.
- [b] General Counsel, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs, OECD, 2011, *who corroborates influence of Wells on OECD Anti-Corruption Initiative*.
- [c] Solicitor, Special Counsel, Peters & Peters, 2011, *who corroborates direct influence of Wells on drafting of s 7 Bribery Act 2010*.
- [d] Institute for International Research on Criminal Policy, Ghent University, *who corroborates influence of Wells on research programme to be used by the European Commission to fine-tune the provisions relating to the liability of legal persons*.
- [e] IBAHRI, Latin America to host first consultation meeting of IBAHRI Task Force on Illicit Financial Flows, Poverty and Human Rights:
<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=bc38cd9f-f337-4ef0-8dd2-5b3be8cac058>, *which details the role and activities of this organisation in international tax co-operation*.
- [f] Chairman of the OECD Working Group on Bribery in International Business transactions, *who corroborates Wells’ direct impact on s 7, Bribery Act 2010 so that it now accords with the OECD Anti-Bribery Convention*.
- [g] ADB/OECD, The Criminalisation of Bribery in Asia and the Pacific, Proceedings of the 10th Regional Seminar for Asia and the Pacific, 23-24 September 2010:
<http://www.oecd.org/dataoecd/50/17/46587127.pdf>, pp 75-92, *which details Wells’ contribution to the OECD Anti-Corruption Initiative across South-East Asia*.
- [h] Lord Chancellor, *Bribery: Government Response to the conclusions and recommendations of the Joint Committee Report on the Draft Bribery Bill*, Cm 7748, London: TSO, 2009, *agrees with conclusions of Scrutiny Committee endorsing Wells’ approach*.
- [i] C. Wells, *Response to Supplementary Questions to Professor Wells*, Response to House of Lords/House of Commons Joint Committee on the Draft Bribery Bill, *demonstrating direct impact of Wells’ arguments on Committee*.
- [j] Transparency International, *The Bribery Act*: <http://www.transparency.org.uk/our-work/bribery-act>, *demonstrating international reach and significance of relevant provisions of Bribery Act 2010*.
- [k] Director, IBAHRI, *demonstrating Wells’ direct impact on Task Force and recommendations*.