Bribery Act 2010 Committee
Corrected oral evidence: Bribery Act 2010

Tuesday 13 November 2018
11.30 am

Watch the meeting

Members present: Lord Saville of Newdigate (The Chairman); Lord Empey; Baroness Fookes; Lord Grabiner; Lord Haskel; Lord Hodgson of Astley Abbotts; Lord Hutton of Furness; Baroness Primarolo; Lord Stunell; Lord Thomas of Gresford.

Evidence Session No. 17 Heard in Public Questions 155 - 161

Witnesses

I. Lisa Osofsky, Director of the Serious Fraud Office; Max Hill QC, Director of Public Prosecutions; Hannah von Dadelszen, Head of Fraud, Serious Fraud Office; Kristin Jones, Head of Specialist Fraud Division, Crown Prosecution Service.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.
Examination of witnesses
Lisa Osofsky, Max Hill QC, Hannah von Dadelszen and Kristin Jones.

Q155 The Chairman: On behalf of the Committee, I welcome Lisa Osofsky, Max Hill, Hannah von Dadelszen and Kristin Jones to give evidence to us this morning. The session is open to the public. It is broadcast live and will appear on the parliamentary website. There will be a verbatim transcript of the evidence. A few days after this session, you will be sent a copy of it. At that stage, we would be very grateful if you could check it for accuracy, make any corrections that you feel are required, and amplify any of your evidence if you so wish. Indeed, if you wish to give any further evidence that you think would be useful to the Committee, please do so.

Although we know who you are, I will ask you in turn to introduce yourselves so that that introduction can appear in the transcript.

Lisa Osofsky: I am from the Serious Fraud Office.

Hannah von Dadelszen: I am also from the Serious Fraud Office.

Max Hill QC: This is my thirteenth day as Director of Public Prosecutions.

Kristin Jones: I am the head of the Specialist Fraud Division in the Crown Prosecution Service.

Q156 The Chairman: You will have received a list of questions. Neither you nor the Committee are confined to them, but we will go through them, and if you wish to add anything that is not encompassed in the questions, please do so.

I will ask the first question. Prosecutions for offences under the Bribery Act require the personal consent of the DPP or the director of the Serious Fraud Office. Scotland has no analogous provisions. Are our provisions overkill?

Lisa Osofsky: In our office, it is a different model. We both investigate and prosecute. Therefore, I am not in the same situation as someone who inherits a case that has already been investigated by another body. I apply the same standard to Bribery Act cases as I do to all the cases in my docket. Mind you, it is a much smaller docket than Max’s. We have an intelligence function that looks at the initial, sort of pre-investigation, phase. I approve investigations themselves, so I go right back to the beginning, regardless of the topic, whether it is complex fraud or bribery, and I will decide whether we have a charging decision.

So the way we deal with cases at the Serious Fraud Office is slightly different, and I am involved in every decision. I am the accounting officer. The buck stops here. I want to be able to make that decision from start to finish.

Max Hill QC: As the Director says, there is a difference from where I sit, not being an investigator and not even having the power to order the
commencement of an investigation. We respect entirely the fact that the requirement for personal consent was a parliamentary decision, no doubt because Parliament and the Government of the day were rightly cautious, I suggest, about what could have been an early rush of Bribery Act offences immediately on the granting of Royal Assent in July 2010.

There has been no rush, but not because of any blockage at the consent stage, so far as we are concerned. So I suggest that it works, but whether this Committee and the House will want to consider an amendment to it in the longer term is, in the first place today, a matter for the Committee.

By that I mean two things. First, having had the benefit of hearing Sir Brian Leveson’s evidence—we may come on later to the question of extending the reach of some of the offences under the Act; Section 7, the “failure to prevent” offence, has been touched on already this morning—in the event of an extension, say, to other areas of fraud or economic crime, that might be an opportunity to reconsider whether personal consent in my position is required.

I would add that, as a matter of experience, the head of our Specialist Fraud Division, who is very much our subject specialist, sits right alongside me, but within the organisation that I represent we have, in each of the regions, a Chief Crown Prosecutor. If I were pressed, however gently, to say whether in my view, looking at it within the organisations, these are decisions that could be devolved down to Chief Crown Prosecutor level, I would not demur.

There is flexibility if, in the fullness of time, this Committee and indeed Parliament says that the initial caution can now be replaced with a more flexible view.

**Lord Grabiner:** We have had evidence from the City of London Police to the effect that the mechanism for securing consent has been long-winded, for want of a better expression, and that that might have led to defendants being charged with different offences apart from bribery. Is there any substance to that?

**Max Hill QC:** I am bound to say, with absolute deference to the evidence that has been given, that I do not recognise a bottleneck here. Of course, submissions will have to be prepared in order that a case be put, at the moment, up to me, but I am not aware of any worked example of where there has been lengthy delay or where the outcome has been different from what may have been intended or expected by the investigator. So I treat that with caution.

However, this area of legislation, albeit that we may go on to discuss it, has not perhaps generated as many cases as some might have expected—and here we are, seven and a half years after Royal Assent. In the Crown Prosecution Service, it resonates at all levels of the organisation, by which I mean that our CPS regional areas deal with cases that tend to be of the lowest complexity—down to bribery with a
view to obtaining a driving licence, to give an example. Alongside that are our casework divisions, which are not all based in London but have regional working as well, which will look at many of the more complex cases. Alongside that is the Specialist Fraud Division, which will look at the largest cases that our organisation considers. So we have an organisational structure, and it is all in place at the moment to assist me if I need to make that personal decision.

Yes, there will be times when there is delay. Just as in Sir Brian’s worked example where he in effect sent back to the parties what was proposed for a DPA, we reserve to ourselves the right, in general crime and in specialised areas such as this, to say to the investigator, whoever that might be, that a little more work needs to be done before we reach the charging point. That is not delay. It is certainly not a bottleneck. It is the prosecuting authority taking care to ensure that in each case where personal consent is granted, as here, the case is really ready to run.

That is the way I would encourage people to look at that issue.

Baroness Fookes: Do you mean that your personal consent was required in the case that you cited of the person trying to bribe the driving examiner?

Max Hill QC: Yes, that is technically correct. In the first slew of cases, personal consent is required every time. I do not shirk away from saying that that could be made to look like quite an onerous responsibility. In fact—you may have some statistics from the Attorney-General’s office—so far as the CPS is concerned, we made 13 charging decisions last year and 13 this year, so 26 over two years. I am by no means seeking to add to my personal workload, but actually the number is proportionate. It is manageable.

Going back to my first answer, however, if—this might require at least secondary legislation—Parliament thought that now that the legislation has bedded in we can have a more flexible regime and not require personal consent, I would agree with that. To take your example, if I may, that might mean that where an individual CPS area is looking at low-level criminality, the Chief Crown Prosecutor in that area could take the decision rather than it having to come all the way to me.

Lord Thomas of Gresford: Presumably you would have to lay down guidelines to the area prosecutor, who decides whether to take the decision himself or to refer it up. Do you see any difficulty with that?

Max Hill QC: I do not within the organisation. Where we have a specialist division within our organisation, which is the field leader, that is immediately where I would look for the laying down of terms. But let me be clear: I place absolute faith and trust in the very senior and experienced prosecutors who occupy Chief Crown Prosecutor levels within the organisation. I place my confidence there.
**Kristin Jones:** We have plenty of guidance in relation to decision-making and I think the Chief Crown Prosecutors would rely on that.

**Lord Grabiner:** The consent point may just be a historical hangover. I know it has been legislated, but that was the position under the old law. It may have been adopted for perfectly good reasons, but are you saying now that it is unnecessary? Would you go as far as to say that?

**Max Hill QC:** I am not trying to avoid it; that is the point I am making. If we maintain the status quo, that does not present a difficulty within the organisation. But I recognise, as many commentators do, that we are still in the early years of the implementation of this statute.

To take one transatlantic example, the Foreign Corrupt Practices Act 1977—the US equivalent—found that for as long as perhaps the first 20 years after implementation, the number of prosecutions brought was low, and then there was a rising curve. We are going through that same process in terms of the number of years. We may therefore see an increase in the number of prosecutions. That would consolidate the point that further flexibility over time might be a good thing.

**Lord Thomas of Gresford:** Presumably there must have been some feeling at the time the director's office was formed that there is something special about bribery that takes it outside ordinary fraud and corruption. Do you think there is anything special about bribery?

**Max Hill QC:** I would suggest that there are a number of special features. If I dare say so, as one lawyer to another, we can recognise that the Section 7 offence in particular is an interesting “failure to prevent” offence. Looking across criminal law in general, there are very few offences of omission—almost all are offences of commission—but this is an offence of omission. That does set it apart. It means that it has a hybrid function within commercial organisations. There is a preventive function. You need to look within your own structure to ensure that you do not breach the law that has now been passed.

There is then a reactive function on the part of the Crown Prosecution Service and other prosecuting authorities to step in and to prosecute where the line has been crossed. In that sense, through this Act we are taking acts of omission into the criminal courtroom, which does not happen in very many other places. To that extent, it is special, but I emphasise that it is crime and, like so many other species of crime, it is quite right that when it passes the Code for Crown Prosecutors test as to evidential sufficiency and public interest, it belongs in court and that is where we take it.

**Lord Grabiner:** Another thing that is peculiar to the bribery issue is that it might involve a foreign Government or foreign government officials. One can see that that might provide a justification for more senior scrutiny and prosecutorial discretion because of the impact on international relations.
**Max Hill QC:** Yes. I would tend to agree. As you know, the Section 6 offence has not been used with great frequency, but that is perhaps for other reasons: the complexity and level of investigations, as well as the time that they take. Perhaps we will come back to that later.

Q157 **Baroness Primarolo:** Lisa, picking up the last point about highly complex cases and the level of investigation that is necessary, do you believe the organisation has adequate financial and human resources for the lengthy investigations that are often involved in relation to offences under the Bribery Act? In particular, do you find it difficult to compete with the private sector on the skills that you are looking for in attracting and retaining staff?

**Lisa Osofsky:** I was very lucky to come to the helm when we had a nice uptick in our core funding. What used to be £34.3 million is now £52.7 million—great, a nice big extra chunk of change.

In terms of our ability to go back for additional funding, there is a new mechanism. It is a slightly different version of what was called blockbuster, but it allows us to ask for additional funding if in a financial year we have a case that goes over £2.5 million; we are allowed to go back to ask for more.

I am not quite as green as Max, but I just got here so I am pretty green. I would like to give it a go and see if I can make it work with the extra I have been given. If I cannot, I would certainly consider all measures. But at this point my feeling is, “I have a nice extra amount of money and the ability to go back when I need more”. We have not had any cases that have not been brought. We have not faced the sad day when we cannot bring a case because we do not have the money. I would not want that to happen in my lifetime. Given the funding structure, I am confident that I will not face that. At this point, my sense is that we have the finance that we need—for now, provisionally.

Also, if you look at the trajectory of our past years in existence and what we typically spend, we are in the right ballpark. We are just about there. I will not bore you with the pence here and there, but I am the accounting officer. I am quite conscious of what our cases are going to cost. I am from the Midwest of the United States, so I am going to approach this with a Midwestern optimism. We appear to have the structure that will work for us.

The human side is another great twist, of course. I came from the private sector. I came to the Serious Fraud Office because it offered something very different. We find that we get really dedicated prosecutors who actually want to serve the people. We want to do something different. We want to make a difference. I was very happy in my prior job. No one had kicked me out, I was not looking for a home. I actually wanted to add value in a way that I thought would really matter. I saw challenges. I think the Serious Fraud Office takes on some of the best cases. We are making great cases day in, day out. We are getting refugees from the
bulge-bracket law firms. I go round with my begging bowl asking for secondees or people who might want to join us.

We have just advertised for a general counsel because the former general counsel is going out to the private sector. We have shown that we can be a good platform for those currently in government to go out and make possibly more substantial money than we are allowed to offer at the SFO. We are seeing a slight change. It is sometimes unkindly referred to as the revolving door. I do not like that term; it seems a bit negative. We are seeing that we are offering such great experience even to very junior prosecutors that they are able to stay as long as they want, add value, feel great about the work they do, walk with their heads held high, and if they want to go out to the private sector, they can.

The more challenging areas for us are on the tech side. We need to make sure that we stay relevant and current and are offering the sorts of opportunities that we need for the tech side, and I am spending a lot of time and energy doing that. Provisionally, I think we have the right combination in what we are offering people: job satisfaction, the future ability to do well, and the funding that Parliament has so graciously extended.

Baroness Primarolo: You paint a very positive picture for now, given the challenges that your organisation faces. Picking up the answer to a previous question, should we follow the American example where we are on a rising curve as the legislation beds down, people become more aware of it and we may see more self-reporting? Are you confident that the mechanism agreed for your core funding every year—I am not talking about the additional funding—is suitable to meet the challenge, should you find an increasing workload as more and more people become aware that they should self-report?

Lisa Osofsky: I am an avaricious prosecutor. I want more people coming to self-report. I want more people wanting to work with us to make more cases. I would be very pleased if we had the FCPA uptick. It is a well-used tool. Mind you, we are not so far behind when it comes to deferred prosecution agreements. I do not want to get too off-track—I know that was not your question—but we are second to the US in our experience with a new mechanism that is being mirrored around the world. I hope we get some of that trajectory. I already see that we are considered expert in an area that is relatively new to the legal world in general.

Look, if I need more money, I am not shy; I promise I will come forward. Right now, though, with the significant uptick, it is a big percentage of what David Green had. I want to be greedy about my cases. I do not want to be greedy about the money. I am confident that we can make it work for now. If we get lots more work, I promise I will be the first to raise my hand and say, “I need more money”.

Lord Empey: The Committee has been a bit concerned that there is no level playing field between large corporations and small enterprises. Where you have a large corporation with its own legal department and
access to the best brains, is the prosecutorial side of things an even playing field and resilient enough?

Obviously, you are painting a positive picture, and that is reassuring, but there is still a feeling in the back of some Members’ heads that perhaps the playing field is not even between the large corporations and the small. I am sure you have heard that yourself. Do you feel that you have sufficient depth and resilience to take on the big guys as well as the small guys?

Lisa Osofsky: I love nothing more than the challenge of taking on the big guys. In a lot of ways, it is easier to take them on. I want the challenge. We are happy to do it. We do try. We face other hurdles. Sadly, I had to miss Sir Brian’s discussion, but it sounds as though there was some discussion about extending corporate liability. That might be an area we would want to probe together. The Bribery Act does something wonderful for us in that area that I wish was mirrored elsewhere other than just the failure-to-prevent facilitation of tax offences.

Putting that aside, it is a challenge for the smaller companies. I advised a lot of them before I got here. There is a lot of material out there on the internet. As we all know, there is a booming advisory, legal and accountancy world in London. We are lucky. We are a big city. We have lots of advisers running around. There is a certain amount of material out there. I am not saying it is as easy as when you have your own GC who can put very complicated programmes in place. My own work was typically at international banks, which have huge compliance functions. There are all sorts of requirements. I hope, as I continue to do my work, getting out there and explaining what the law is about and talking to various audiences, not just the big boys but whoever will have me and wants to hear what I have to say about this area of law—Max is out there as well, publicising the importance of this kind of work—that there will be more understanding. In the SME world there is possibly a little less awareness. When you get cases made against some of the smaller organisations, I dare say that will focus the minds as well.

Lord Thomas of Gresford: You are happy that there is equality of arms for the big companies, but is there equality of arms for the SMEs, from their point of view?

Lisa Osofsky: It is difficult for them. The difficulty has to do with the legal structure. There are certain cases that I am not allowed to talk about, but we are trying to get the corporates in the dock and we have met with mixed success. We have met with much better success in the area that you are focusing on. We are finding it a difficult one for us, yet we keep trying.

If there was an extension of these rules in terms of corporate criminal liability or vicarious liability, we might find ourselves less hamstrung by
the identification principles. We might make better progress against some of the larger, fair-fight opponents of the SFO. I am willing to take them on. I wish the law was completely in my court, because I would like to be able to show just how much that is a challenge I welcome. But for now it is harder.

There are fewer resources for the smaller corporates. There is information out there. Awareness-raising needs to go on. Your work as a Committee will help that; it will publicise it. I am willing to go out and talk to various audiences, including compliance-oriented audiences, not just my own prosecutors. I am out there talking to business. I do not see David Gold here, but I was able to meet a group he has formed that is worried about governance. They are all GCs. All I can do is try to bring fair cases.

One last point is that “adequate procedures“ is different for different companies. What I might require of a bulge-bracket bank when I think about a Section 7 defence is different from what I will think about with an SME. Knowing a lot about compliance because that is a strong interest of mine, I understand that SMEs cannot do everything the big boys can do. So when I look at whether an SME is a suitable candidate for a prosecution or a DPA, I will demand something different from it.

Lord Thomas of Gresford: Do you scale down your armoury for them?

Lisa Osofsky: Do I fight with one hand behind my back? I am not sure. Mind you, we have Sir Brian at the other end of that to make sure that we are all playing by the same rulebook. He has to bless whatever comes out at the end of the day, if it is on the DPA side. I would hate to think that I was acting against interest, but part of my job is to be proportionate. That means that I have to have a realistic understanding of what some of the smaller companies can deliver.

Lord Hodgson of Astley Abbots: I am not a lawyer. I am from the business/commerce end. We have talked about sins of omission. We have talked about foreign Governments. These are sensitive matters. We have also heard that for a company—any company—dealing with allegations under the Bribery Act it is exceptionally demanding of senior management time. In a smaller company, your senior management is your management, as opposed to other companies that have many more resources. Time is of the essence.

To a non-lawyer, it looks as though these cases take an awfully long time to get to court. For a small company, that is doubly devastating. Do you have a system of making sure that the whip is applied to the horse, or are we too often thinking, “Gosh, this is difficult. We need to know a bit more about this, a bit more about that. We’d better check this. Can we check that?”, because for a small company a long period of investigation may well break it.

Lisa Osofsky: It is a great question. I have been telling the staff since I got there: “I want to be the person who leaves absolutely no stone
unturned”. So your example is perfect. We need robust prosecutions; I do not want anybody in the dock who should not be there. However, our cases are, almost by definition, international. We have to rely on other countries to deliver evidence in a format that we can use in our country. That slows things down; it just does.

We are going through a more formal process. I invest as much time as possible in making sure I have good relations with my former employers at the United States Department of Justice and the FBI, where I once worked. Around the world, I am spending a lot of time making sure that we get along well and can do things as expeditiously as possible.

That said, getting it in a format that is acceptable to a court is time-consuming. I want to make sure that we are being thorough, to the point that nobody is in the dock who we do not feel confident should be there. I realise that some amount of delay is doubly difficult for smaller companies, because, as you say, if you are taking the only three people out of the box, and they have to occupy their time with the fear of a criminal investigation, that is difficult for them to deal with.

**Lord Hodgson of Astley Abbotts:** When you have trouble with overseas Governments and overseas prosecutors in getting a response, does Her Majesty’s Diplomatic Service help you?

**Lisa Osofsky:** We like to work with everybody. We work through the Home Office and try to use to our advantage all the tools that Parliament has given me. We feel that we are getting great co-operation. I have spent time with Andrew Bailey and Mark Steward at the FCA. I am from a jurisdiction where we have a lot of group work. The FSO is founded on the idea of the Roskill model, where different specialisms all sit and work together. I learned how to prosecute a case from the FBI agents who brought matters to me as a junior prosecutor in Chicago. I believe in working across different jurisdictions and sectors. We find that, when we approach it the right way, people are absolutely willing to help.

**Lord Haskel:** You are also an investigator. Do you have enough resources for that? Does that delay the work of your office?

**Lisa Osofsky:** Investigating is one of the critical functions that was part of our formation 30 years ago. We staff to investigate just as much as to go into court. We are blessed to hire some of the best and brightest from the Bar to present our cases in court. We have lawyers, investigators and accountants with their areas of responsibility, and we very much budget for that.

Provisionally, after two months in the chair, I hope that the extra core funding we were given and the mechanism at which it was arrived at is the right one for us. All I can say is: so far, so good. We are making great cases. I was really excited to see what the docket looked like and how many of us were spending time on the specialism we were trained to do. Those investigators are critical for us. We have huge document-
intensive cases. One, Rolls-Royce, had 30 million documents. Think of sifting through all that.

We need those specialist skills, not just lawyers who can look through it for legal professional privilege and other things. We need to make sense of some of those ledgers. We need and rely on our investigative cohorts, so, yes, for now, if we have the right budget, I very much see investigators as critical to that mix.

Q158 **Lord Stunell:** Yes. I think your panel is well equipped to answer it. What lessons can we learn from the United States? Would prosecutions of large corporations be assisted by adopting the principle of vicarious liability of a corporation for criminal acts by its employees? I am sure you will give a good, wide answer to our question.

**Lisa Osofsky:** My answer is one syllable: yes. I am happy to talk more fully. Anyone who has paid attention to this area of law watched my predecessor David Green—hats off to him—bring us into a new regime where we are out in front in prosecuting in this area and looking for a level playing field here. You only have to look at the OECD’s phase 4 report, which said that the UK is out in front, thanks in large part to the practical approach of the Serious Fraud Office. We have been recognised in our jurisdiction and in the world for being inhospitable to bribery and corruption. That is good for UK plc. It is exactly what we want. It is hard for us when we cannot get the corporates in the dock, because corporations act only through human beings, from beginning to end. The identification principle made sense 100-odd years ago, when corporations were run by two, three or four people. We know, and you know from business, that that is not the state of affairs these days. We tried charging CEOs. I do not know how many people follow the press, but we are trying to get CEOs and corporates in the dock together. We are not always meeting success.

One area where we have had a huge impact is in bribery because of the failure to prevent offence. That has been not just from a prosecuting standpoint, but from that of incentivising corporates to do the right thing and get the right procedures in place. It all used to be about anti-money laundering. I was at Goldman Sachs when the Proceeds of Crime Act came out 15 years ago. We were a great jurisdiction for that. We were gold-plated, asking more of our regulated industry and way out in front. Bribery was very much in the back seat. Fast-forward to now, with this great law in place, and we are making real inroads, but I will mention an area that we still find difficult, and it is hard for us to reconcile. I am supposed to be covering not just bribery—although I know that that is what this Committee is focusing on—but also all the other economic crime areas, such as fraud and false accounting. I see a disparate ability to make the corporate pay if there is a real failure of controls or of leadership, if it is an endemic problem with the corporate. It is heart-breaking, and vicarious liability would cure it. I do not think everything is great in the US. A lot is really not great, but that is one area where, as a prosecutor, I feel as if I have my hands tied here.
The Chairman: As far as bribery is concerned, Section 7 avoids these difficult questions of controlling mind or vicarious responsibility. Do you wish to make any comments on Section 7?

Lisa Osofsky: Sure. Lest you worry, I am a qualified barrister as well, so I understand the rules in this jurisdiction. It might make sense to treat all economic crime in the same way. I realise that that is not necessarily a matter for this Committee, which is focused on bribery and the Bribery Act. It can feel inconsistent—though I do not want to say it, because they are just different rules—to treat bribery in one category and failure to prevent tax evasion, under the Criminal Finances Act in place since last year, in another. What about the other economic crimes? But Section 7 is very good for us. Using the vernacular, if I could not get vicarious liability across the board, I would certainly be happy having a failure to prevent offence that I could use throughout the economic crime arena.

The Chairman: If I understand you correctly, you are in favour of Section 7, although you think it is possibly beyond the remit of this Committee. Should the Section 7 method be extended to other crimes?

Lisa Osofsky: I do not think anything is beyond your remit. I have read all the bios of the illustrious panel before me. I do not mean to imply that it is somehow beyond this Committee’s expertise. I just did not want to get us off track. Yes, we find the Section 7 offence very helpful. We have incredible levels of corporate engagement. All the big boys we talked about are coming in to talk to me. Would they talk to me if I did not have this offence? I do not think so, because they would look at the identification principle and say, “What is the chance that I’ll be caught for this? I’m not going to get done for this. Why would I bother going to talk to the SFO? Why would I bother proactively cleaning up the house on the compliance side?” So I am very much in favour of the Section 7 offence and, if I had my way, I would like it to apply elsewhere.

The Chairman: Looking at the other side—controlling mind—you are not suggesting that there should be an exception for bribery, in the sense of making bribery a question of vicarious liability. If I understand you correctly, as a prosecuting authority you would like to see the question of vicarious liability extended across the board to all criminal cases.

Lisa Osofsky: I was asked the direct question, “What do you think of vicarious liability? Would you like it?” My answer was yes. It still is, because I am greedy. I am a prosecutor. My job is to make sure that bad guys are where they should be, which is—

Lord Grabiner: When you say “bad guys”, is there not an important difference between vicarious liability for somebody else’s criminal behaviour and a key principle of English criminal law—that it is critical to be confident, before convicting, that somebody has an appropriately guilty state of mind? You would be keen to have vicarious liability across the board because, first, it would make it much easier to prosecute and convict and, secondly, you would not have to prove guilty knowledge on the part of the corporate entity. That is not very attractive in terms of
satisfying the basic requirements of English criminal law, is it?

_**Hannah von Dadelszen:**_ I just want to add something to the picture that has been painted. Vicarious liability in the States operates on the basis that there must have been some benefit to the corporate in assessing whether the acts of the individual in focus can be attributed to the corporate entity. When there is a discussion of whether the corporate should really have responsibility for that individual’s actions—because it was that individual who had the necessary mental state and committed the acts—there is a moral case to say it should, if the benefit is in part the company’s as well as, perhaps, in part the individual’s. Looking at the corporate benefit side of it is a feature of the analysis overseas.

_**Lord Grabiner:**_ That is the way that English civil law works, but not English criminal law. Maybe you are right. I do not have a strong view one way or the other. I suspect Lord Thomas does.

_**Lord Thomas of Gresford:**_ Vicarious liability does not suggest that there have been failures of procedures. You can be vicariously liable even if your procedures are absolutely gold-plated. Section 7 is much more satisfactory in making the company criminally liable for the act of an official way down the chain, about whom there is no knowledge and who is acting contrary to company policy. I would not seek to have vicarious liability in this field at all.

_**Lisa Osofsky:**_ I can safely say, even though I am an avaricious prosecutor, that, if we had someone way down the chain acting off-piste, we would bring a different kind of prosecution. We can and do still prosecute individuals, even when we go after the Section 7 offence. If we have culpable individuals, we will have them answer the charges they face.

_**Lord Thomas of Gresford:**_ Yes, but it might depend on how much the company has gained from the action of that individual, who may have bribed his way into securing a very profitable amount of money for the company. In such circumstances, the temptation with vicarious liability would be to go for the company and get the money back.

_**Lisa Osofsky:**_ To me, that would be an abnegation of my duty as a prosecutor. I have to figure out who actually did something wrong, who had the requisite mens rea. Vicarious liability never meant that I—back on the mean streets of Chicago—would go looking for the deepest pocket, which is the example you are positing. It is still my obligation as a prosecutor to make sure I have the people with the requisite knowledge, who have committed the offence I am faced with, in whichever jurisdiction I happen to be practising, in the dock.

_**Lord Thomas of Gresford:**_ That means that a company may make a £2 million profit, and the individual responsible for getting that contract through bribery gets peanuts. So the company hangs on to its £2 million profit. I am against vicarious—
Lisa Osofsky: I can tell.

Hannah von Dadelszen: Our decision-making is guided by a code. We would not make decisions that are not in the public interest. Every time we assess liability in particular cases, we look at everyone and assess both the evidence and the public interest side of things. So that inequitable result would be very unlikely.

Baroness Fookes: Ms Osofsky, you mentioned that you quite welcome people coming into your office to seek advice. Taking it a step further, would you like to have, in this country, the United States procedure allowing corporations to seek an opinion on the adequacies of the procedures they propose to adopt?

Lisa Osofsky: Apologies if I misspoke. I do not like people coming to seek advice. I like people coming to tell me what they have done wrong, how sorry they are and how they want to make it better. You may be referring to a US Department of Justice feature that it would sometimes field questions from the outside world. The company would say, “If I did this, will you prosecute me or not?” That is not my job here in this country. I have a different job here. I think that could be a nice, helpful thing for companies to get a little comfort ahead of the curve. Do I want to get into the business of that here? I do not. I have enough work to do. Boy, it would blow my budget if I were asked to give assurance all across the piste. My prosecutors have not had the background I have had, looking at banks’ compliance programmes and working at Goldman Sachs. So I do not have the requisite skill set even to give that kind of advice, and I do not feel like using my hopefully sufficient budget to pay KPMG, Slaughter and May or whoever else to give me that sort of advice.

Frankly, DoJ is moving away from some of that. It used to have a compliance officer, a woman called Hui Chen, to give compliance-related advice along the lines of, “Does this corporate have the right procedures now? Does it really appear to be reformed or is it going to be recidivist? Does it have the right things in place?” DoJ has not filled that slot since she left in June 2017. I was at NYU School of Law last week with the number three in the US Department of Justice. It does not plan to fill that slot. It is actually doing something different. So, talking just about my jurisdiction, I do not think I have the mandate from Her Majesty’s Government or the requisite skill set or funding to offer precursor-type advice. My job is to ferret out wrongdoing, to investigate robustly and then to determine whether charges are appropriate.

Baroness Fookes: In fact, it is tailing off in the United States itself as a possible procedure.

Lisa Osofsky: I do not want to mislead the Committee. I will certainly go back to see when the last DoJ opinion was given. Let me get back to you on that one. What is tailing off is having a specialist compliance adviser in-house. That is not what DoJ is doing right now. Let me get back to you on the opinion procedure that they are following and let you know the
numbers to see whether it is still an active avenue for exploration by companies.

**Hannah von Dadelszen:** It is not part of our function to provide an insurance policy for companies that want a rubberstamp on their compliance programmes. The adequacy of a corporate’s compliance programme is its own responsibility. If something goes wrong and that corporate has to come to talk to us, we will trawl through that programme. It is at that stage that we will ask the questions, but it is really not for us to provide that assurance before anything goes wrong.

**Baroness Fookes:** We fully understand that. We were asking whether you would welcome the introduction of a foreign procedure—clearly not.

**Lord Grabiner:** A regulated bank would have a daily relationship with the FCA or the PRA, whoever it might be. That kind of conversation would be much more understandable, but as far as you are concerned this is definitely not for you.

**Lisa Osofsky:** Not on the advice-giving, no.

**Lord Grabiner:** I understand that.

**Lisa Osofsky:** Thank you.

**Lord Grabiner:** In fact, I might even agree with it.

**Lord Hutton of Furness:** The Section 7 defence under the Bribery Act requires a company to show that it had in place “adequate procedures” to prevent bribery. Some of the witnesses that we have heard from have suggested that the term “reasonable procedures”, which is used in the analogous provisions of the Criminal Finances Act 2017, would be more appropriate. Do you agree? Perhaps Mr Hill might take that first.

**Max Hill QC:** Plainly, having had the benefit of the exchange between Sir Brian and the Lord Chairman on the question of adequacy versus reasonableness, I cannot pretend to improve on what was even possibly agreed around the table. Looking at the way Parliament legislated in 2010 and again last year with the Criminal Finances Act, it is not clear to us whether Parliament intended there to be a clear difference between “adequate procedures” in the Act that we are considering today and “reasonable procedures” in the CFA last year. Therefore, we take it, as a prosecuting authority, that Parliament meant what it said in 2010—namely, “adequate procedures”. We would suggest that although in the world of lawyers and the courtroom reasonable procedures and reasonableness is a very well-worked principle, which practitioners and judges deploy every day, as Sir Brian knows only too well, in the world of compliance, which we were just touching on, our suspicion is that the word “adequacy” has potentially a greater resonance than “reasonableness”.

Looking at it from the perspective of the cases we bring on behalf of the CPS, there is an argument that "adequate"—the current test—is focused
on the bribery that has taken place and what should have been done to prevent it. QED, that prevention has not worked because the prosecution is on foot—a point already made. I put this out for discussion: it might be that in the business world—we are talking about bringing businesses from boardroom to courtroom—reasonableness might be thought a more theoretical test than adequacy, which we suggest is more easily digestible in a boardroom. That does not resolve the conundrum of what you then do when you take the boardroom into the courtroom. As Lord Saville has said, adequacy may ultimately come down to reasonable steps and reasonable procedures in all of the circumstances that are malleable according to the size of the organisation and the crime that you are presenting. The short answer to your question is: we are content with adequate. We think we understand what it means. We suspect that it is understood in business. We are not advocating a change per se.

**Lord Hutton of Furness:** That is a very interesting answer and I am grateful to you for it. Obviously, you are the prosecutor. You have to decide whether, in your view, the procedures that a company has followed meet this test, whether you bring your prosecution or not. I got the sense that you think that “adequate” imposes a higher threshold of responsibility on a company than “reasonable”.

**Max Hill QC:** I would look at it in terms not of elevation but of comprehension in the light of guidance that is already in place. We were just touching on whether to introduce foreign practices of prosecutors going out to give guidance. In this jurisdiction we have some pretty robust guidance because the Ministry of Justice brought it out in conjunction with the Act. The six key principles that must be features of anti-bribery procedures for any commercial organisation are well known and are there. Prosecutors do not need to tell companies what to do. Forgive me for going through the list, but they are: proportionality; top-level commitment; risk assessment; due diligence; communication; and monitoring and review. That is transparent and is what is meant by underpinning the adequacy of your procedures with a view to avoiding prosecution.

With a view to the other route—a deferred prosecution agreement—there is the 2013 guidance. In this case, it is given not by the MoJ, but by we two prosecuting authorities together through our predecessors. It is fairly prescriptive and helpful as to the circumstances in which a DPA is likely to fit and, therefore, those circumstances in which it is not. In that regard, since I was just looking at the code when Sir Brian was answering questions, how to evaluate how proactive a corporate has been is specifically dealt with in the code for the note, as I would say to a judge in court. Page 6 of the DPA code of practice says in the second footnote: “The prosecutor may choose to bring in external resource to assist in the assessment of”, the company’s, “compliance culture and programme”. There is pretty robust guidance on what to look for without us having to go any further or having to change the statutory test.

**Lord Hutton of Furness:** So there is nothing that would interest us
Max Hill QC: As I say, I give due deference to the extent to which it is quite difficult to place clear water between adequacy and reasonableness in legal terms. I go back to my first suggestion: in the world of compliance, we would suggest that “adequate” is understood in line with the guidance that has already been given by the MoJ and elsewhere.

Lord Thomas of Gresford: Can I follow that through? It seems that it comes down to what the judge says in directing the jury: “You know what has happened, members of the jury. You know what the compliance programme was. Was it adequate in all the circumstances?” That is quite a simple question. Once you start saying, “Was it reasonable?”, that introduces all sorts of different concepts. It almost becomes philosophical. It goes beyond what the procedures were. I say this having argued for “reasonable” in the 2010 Act.

Lisa Osofsky: We have also had seven years of case law. Sometimes by contra-example we know what is inadequate and what finds its way into the court system as a matter of either a guilty plea, a conviction or the subject of a DPA, where we have Sir Brian’s erudite remarks about how things were working. One more factor that would make me echo the comments I have heard here is that we have some colour to this already. We know the parameters as prosecutors. I think the business community understands that. I can safely say that all the advisers out there have been focused on this helping them to understand and implement adequate procedures.

Lord Hutton of Furness: Am I right in saying that we have not yet had any clear judicial interpretation of the meaning of “adequate” versus “reasonable”?

Lisa Osofsky: Right, and all I am saying is that we have a number of cases now that have been decided under the Bribery Act. We have looked at the DPAs. We have some sense of what “adequate” means. I do not know—I am happy to be told that I am wrong—but, evaluating one versus the other, the Criminal Finances Act is newer. We have a little history behind us, in terms of what “adequacy” means. We have cases that may not focus exactly on whether this was “adequate” per se, and how that compares to “reasonable”, but we have a little understanding through the analysis that has gone into the DPAs and the convictions in this area. Those are just a couple of examples that help us understand what “adequate” means.

Lord Grabiner: “Reasonable” would assist defence counsel rather more than “adequate” does, in which case I understand why you would be content to leave “adequate” where it is.

Max Hill QC: We are content with where the law currently sits, although we prosecute with lower frequency than our counterparts in the corporate arena. In the most recent corporate prosecution—the case of Skansen, which might be interesting for a number of reasons—our observation was
that the company was rightly convicted. As far as I am aware, there was no difficulty in comprehension at a jury level, and certainly not at a judicial level, as to what the test was, and a conviction was returned. I suppose one would have to ask the defence Bar what they regard as the difficulties they had. When robustly argued, as it no doubt was, the case proceeded on a practical level without any difficulty. There was an unequivocal decision by a jury, which perhaps touches on another area of interest to the Committee: can we take these cases in front of juries? We may touch on that later. This is positive evidence that we can. It is the job of prosecuting authorities to make this comprehensive and comprehensible to ordinary members of the public sitting as jurors.

Baroness Fookes: So you are really saying that if it ain’t broke, don’t fix it.

Max Hill QC: I suppose I am.

Lord Thomas of Gresford: If the European investigation order directly ceases to apply to the United Kingdom and is not replaced by a multilateral measure of equivalent effect, to what extent might this affect your investigations in bribery cases?

Max Hill QC: For many investigations that reach far beyond the EU, not at all. That, I think, is the yardstick. Both prosecuting authorities here have experience, in all those parts of the world that are beyond the European Union, in the mutual co-operation instruments and principles that allow us to reach in to other jurisdictions to bring back evidence, and sometimes individuals, with a view to furthering the investigation. Brexit will not have an impact on that. The premise of the question is: to the extent that we have ongoing investigations within EU countries, would the possible demise of the EIO—and, we might add, the European arrest warrant—have an impact? There would be an impact, because we would need to fall back on the mutual co-operation instruments that were in place prior to the EIO, which has been in force for only a year, and the EAW. Is that going to generate work? Absolutely, yes it is.

I did not intervene in the discussion of resources when you were listening to the director, but it is important to say, from the point of view of the Crown Prosecution Service, that there could very well be resource implications depending on where we end up with Brexit. As a prosecuting authority for all crime nationwide, we are preparing for every outcome, whether that is deal or no deal. We understand that the demise of the EIO and the EAW would require 27 bilateral arrangements as opposed to a single multilateral one. We have procedures in place. We are managing our resources as best we can to prepare and protect the organisation in that event. This summer we created three new fraud centres to prepare for the future in general, and Brexit is part of the future. So it should not be a surprise if and when I say, in future, that there have been resource implications, this is what they are and we will cost them. But we wait to see. In many of the sorts of investigations that this Act presupposes, there will be little impact where they are beyond EU borders.
Lisa Osofsky: I will just add a practical note for the Committee. I do not disagree with anything my colleague has said. On an operational level, we are in the middle of all sorts of investigations where we have invested blood, sweat and tears over the years, both beyond and within Europe. We have joint investigation task forces. We have common goals. We have sat with them year in and year out, so on an operational level we are working closely with our colleagues around Europe. I do not want to be accused of being unduly optimistic, or act as if I am not seeing the realities here, but I would like to think that, having invested so much energy in working together on certain fronts, on big investigations that we are, let us say, 80% into, we are not going to down pens and cease all good work. Some of that work, on the operational level, where we work closely and well with our colleagues in Europe, will continue. We have common goals and have been working together for years. We want to see our cases through. I hope that some of that good work will continue.

Lord Thomas of Gresford: As a matter of interest, the European investigation order is very new, but do you imagine that the impact of the removal of the European arrest warrant would be much more significant? Or has the European investigation order system become much more important?

Max Hill QC: It is difficult to compare and contrast. We have been used to using one tool over a handful of years, and the other came into force only on 31 July last year. All I can say is that there would be, in this event, a definable impact in terms of resource and management. I am not sure that there are statistics that would help me here, but I do not think it is possible to say whether the demise of the EAW would be greater than that of the European investigative tool. Both would have a potential impact.

Kristin Jones: It would be a question of speed, in both cases.

Lord Thomas of Gresford: The pre-European arrest warrant system was extremely slow, by factors of many months. Clearly that would be expensive from all points of view.

The Chairman: That brings us to the end of this session. On behalf of the Committee, I thank you all very much for the valuable evidence you have given. I also make a plea that, when you receive the transcript, you provide to us as soon as possible any corrections, comments, additions or anything else you wish to make. We have a lot of evidence to assess, and that would assist us very much indeed. Thank you all very much.