

RESPONSES TO THE CONSULTATION PAPER ON THE REVIEW OF THE OECD ANTI-BRIBERY INSTRUMENTS

Comments from the International Association of Prosecutors

Of particular relevance to the IAP and our objects is paragraph 5 on page 18 entitled ‘Investigative and Prosecutorial Discretion’.

The IAP vigorously supports the notion of Prosecutorial Independence and the first 4 objects of our Association spell that out;

- to promote the effective, fair, impartial and efficient prosecution of criminal offences;
- to respect and seek to protect human rights as laid down in the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948;
- to promote high standards and principles in the administration of criminal justice, including procedures to guard against or address miscarriages, in support of the rule of law;
- to promote and enhance those standards and principles which are generally recognised internationally as necessary for the proper and independent prosecution of offences;

In furtherance of these objects, The IAP produced a set of standards entitled ‘Standards of Professional Responsibility and Statement of The Essential Duties and Rights of Prosecutors’ which I attach.

Of particular relevance is Article 2 on **Independence**

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be :

- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception
- of prosecutorial independence.

and Article 3 on **Impartiality** which states [inter alia]

Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

- a. carry out their functions impartially;
- b. remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;

As is recognised within the consultation document that which constitutes ‘public interest’ varies between jurisdictions.

The availability of 'Prosecutorial Discretion' also varies between jurisdictions. Some adhere to the 'legality principle' [eg Spain and Italy] and others the 'opportunity' or 'expediency' principle [eg France and UK]. Adherence to the 'legality' principle means strictly interpreted that The Prosecutor has no discretion within the decision making process, although it appears that even the legality principle does increasingly permit of exceptions. The 'expediency' principle can permit wide use of Prosecutorial discretion in the decision to prosecute.

Where there should be common cause within the decision making process for all jurisdictions, as the IAP standards articulate, is the need for transparency ,lawful authority and adherence to established guidelines.

I note the reference in paragraph 54 to a 'major case' involving the termination of a case involving a foreign official. I assume this refers to the BAE case and the decision by The Serious Fraud Office in England and Wales to terminate the investigation into the arms deal with Saudi Arabia. We await the outcome of the Judicial Review by The High Court of that decision with interest. It is expected that judgement will be delivered in April. No doubt we shall discover whether the law relating to corruption in England and Wales is found to be wanting and/or whether there was improper/proper political interference.

The Draft conclusions of the Conference of States Parties to The International Convention on Corruption which took place in Bali and which I attended is now available on the UNODC website. People can judge for themselves how much progress is being made in respect of implementation and review. For my part I believe that the concentration of effort should be directed towards cross jurisdictional asset recovery and seizure, depriving offenders of their ill-gotten gains.

I hope this response is of assistance