

# Annex C

## Note by the Commonwealth Secretariat on Existing Multilateral Conventions on Corruption and their Membership Criteria

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### Introduction

This Note reviews the various existing conventions on corruption to which Commonwealth countries may become party. It also discusses the possible ways in which the Commonwealth could adopt its own instrument on the subject.

The existing or proposed instruments considered are:

- ◆ the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- ◆ the Council of Europe's Criminal Law Convention on Corruption;
- ◆ the Inter-American Convention against Corruption;

each of which is open for ratification and/or accession by countries which are not members of the sponsoring international organisation.

In considering whether or not it would be desirable to recommend that Commonwealth countries seek to become parties to instruments concluded in other fora, there is a need to consider issues such as:

- ◆ the rationale for the development of these instruments;
- ◆ the relevance of non-Commonwealth conventions to the broad range of Commonwealth concerns;
- ◆ the ability of Commonwealth countries to influence future developments in these instruments;
- ◆ the incidental costs involved in participating in monitoring mechanisms;
- ◆ the availability of technical and/or financial assistance to Commonwealth countries to meet the implementation and monitoring costs.

# Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (The OECD Convention)

The substantive provisions of the OECD Convention require states parties to criminalise the direct or indirect intentional offering, promising or giving of any undue pecuniary or other advantage to a foreign public official to secure either the undertaking of an official act or a refraining from acting in order to obtain or retain business or gain other improper advantage in the conduct of international business. Related inchoate offences (such as attempt or aiding and abetting) must also be criminalised and corporate criminal or similar liability must be established. Extraterritorial jurisdiction should also be established.

Foreign public officials are those holding legislative, administrative or judicial office, or performing public functions and include officials or agents of public international organisations.

The offences created must be punishable by penalties which are capable of triggering the operation of extradition, mutual assistance in criminal matters, proceeds of crime and anti-money laundering statutes. Mutual assistance and extradition obligations are created by the Convention.

Accounting practices which prohibit the making or keeping of books and accounts which facilitate the concealment of the true nature of transactions must be established by law.

Parties are required to participate in a monitoring process designed to follow up systematically national implementation of the Convention. The monitoring process consists of both self-evaluation and mutual evaluation.

Current signatories have accepted a 1997 Recommendation of the Council on Combating Bribery in International Business Transactions which elaborates on certain provisions of the Convention.

## **Countries entitled to become states parties**

Australia, Canada, New Zealand and the United Kingdom are entitled, as OECD members, to become parties to the Convention. All have signed and are in the process of enacting legislation which will permit them to ratify the Convention.

Prior to its entry into force, the Convention may be acceded to by non-members of the OECD who have been invited to become full participants in the OECD Working Group on Bribery in International

Business. The Secretariat understands that the OECD will welcome any country which wishes to join the group. After entry into force, the Convention is open to accession, inter alia, by any state which has become a full participant in the OECD Working Group on Bribery in International Business.

### **Costs of membership of the Convention**

Other than the costs involved in passing the necessary laws to implement the Convention, states parties will incur the costs involved in the monitoring and follow-up procedure established by Article 12. For non-OECD members a system of cost-sharing applies which accords with OECD rules concerning fees for non-member full participants and observer countries.

Additional implementation costs which may be incurred by states parties include:

- ◆ participation in the OECD Working Group on Bribery in International Business;
- ◆ provision of facilities for extradition and mutual assistance in criminal matters which, under most international treaties and arrangements, including the Commonwealth Schemes, contemplate payment by the requested country of in-country expenses of complying with requests.

### **Legislative initiatives required by the Convention**

The majority of Commonwealth countries will require substantial amendment of national laws to enable participation in the OECD Convention. The following are the principal areas not covered, or inadequately covered, by existing national laws:

- ◆ the laws of most, if not all, Commonwealth countries have always criminalised the offence of bribing one of the country's own public servants. However, few, if any, deal with bribing foreign public officials. Equally few deal with the position of agents;
- ◆ although the Convention does not absolutely require that jurisdiction be established when the bribery offence is committed wholly outside the enacting country, it does require criminalisation when the offence is committed in part in that country. It also requires that no extensive physical connection with the enacting country be required. States parties are exhorted to extend current bases of jurisdiction where this is necessary to combat corruption

effectively. It would not, for example, be within the spirit of the Convention to fail to deal with a company incorporated in the enacting state which paid bribes to foreign public officials out of funds maintained in offshore accounts;

- ◆ exceptions to the privileges and immunities of international organisations are required;
- ◆ corporate criminal liability will, in most countries, need to be extended (or, in some countries, created);
- ◆ although not mandatory, civil and administrative sanctions for bribery must be considered;
- ◆ amendments to companies laws dealing with account keeping, financial statements, audit requirements and empowering the legal “black-listing” of companies;
- ◆ pursuant to the 1997 Resolution, amendment of taxation laws to disallow the deductibility of bribes to foreign public officials.

### **Limitations of the OECD Convention**

The benefits of advocating Commonwealth country participation in the OECD Convention can, notwithstanding its limitations, be recognised. The Convention is in existence and the OECD has indicated its willingness to welcome membership by any country. It represents an important first step in global efforts to combat a global problem. The objective of eliminating corruption in international business transactions is one which is worthy of support and which can assist in the processes of development desired, in particular by developing countries and those in transition. By assisting to ensure that development capital is actually used for development, the Convention has the potential to be of economic benefit to all countries.

While dealing with the important issue of bribery and corruption in international commercial transactions, the Convention is very limited in scope. Its implementation in any country will address only one of the plethora of examples of corruption which are of concern to Commonwealth countries.

Membership of the Convention is not automatically open to every country wishing to sign. Non-members of the OECD must first solicit an invitation to join the OECD Working Group and only if that invitation is forthcoming does the opportunity of becoming a party arise. Any state party may propose amendment of the Convention and amendments are considered by all states parties.

Membership of the OECD Convention alone will not achieve the Commonwealth objective of ensuring that there is national political commitment to the eradication of corruption, that comprehensive and effective anti-corruption legislation is put in place, that the issue of ensuring adequate remuneration of public officials is addressed or that the public is empowered to reject corruption and develop a culture opposed to corruption.

## The Council of Europe Criminal Law Convention on Corruption

This Convention was adopted by the Council of Ministers in 1998 and was opened for signature in January 1999. By the end of 1999, a complementary Draft Agreement Establishing the Group of States Against Corruption (GRECO) is expected to be in force. Together the two instruments deal with the aspects of corruption to be dealt with under the criminal law. The Group of States against Corruption (GRECO) is established “to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings” to combat corruption. It is important to note that the Council of Europe (CoE) intends to conclude other instruments on the subject, including an important convention on the civil law aspects of corruption.

The CoE Convention deals with:

- ◆ active bribery which involves promising, offering or giving, indirectly, any undue advantage to any person, for themselves or for anyone else, for the person to act, or refrain from acting in breach of their duty;
- ◆ passive bribery which involves requesting or receiving, directly or indirectly, any undue advantage, for himself, herself or anyone else, to act or refrain from acting in the exercise of functions.

It requires states parties to criminalise both active and passive bribery of:

- (i) public officials;
- (ii) members of “domestic public assemblies” exercising legislative or administrative powers;
- (iii) foreign public officials;
- (iv) members of foreign public assemblies;
- (v) those involved in business activity in the private sector;

- (vi) employees, those under contract to and persons seconded to public international or supranational organisations or bodies of which the state party is a member;
- (vii) members of international parliamentary assemblies;
- (viii) judges and officials of international courts.

The Convention deals with trading in influence by requiring states parties to criminalise the intentional promising, offering or giving, directly or indirectly, any undue advantage to anyone who asserts or confirms that he or she is able to exert improper influence over the decision-making of any person listed in the sub-paragraphs (i), (ii), (iii), (vi), (vii) and (viii) above.

Related inchoate offences must also be established as must the offence of laundering the proceeds of any offence required to be criminalised. The creation of use of invoices or other accounting documents and the unlawful omission of making a payment record are also to be the subject of criminal provisions and corporate criminal liability must be established.

The subject of the laws required to be enacted are those who commit relevant offences within the territory of the state party, nationals, public officials and members of domestic public assemblies of the party and nationals who work with, or for, or are officials of international organisations, courts or parliamentary assemblies.

Laws facilitating the confiscation or forfeiture of the proceeds of bribery must be enacted. Parties are required to adopt such measures as may be necessary to ensure that specialist independent persons or entities are available and adequately resourced to combat corruption.

Countries must facilitate co-operation by public officials and authorities in detecting and reporting corruption and must provide adequate protection for those who report corruption and for witnesses in proceedings.

To the extent that bank secrecy may inhibit the investigation of corruption offences, it must be overridden and any other required special investigative techniques should be introduced or, if in existence, applied to the investigation of corruption.

National laws must facilitate international co-operation and parties are required to assist other parties in the investigation and prosecution of offences. Mutual assistance and extradition obligations are imposed by the Convention and the international exchange of information is encouraged.

## **Countries entitled to become states parties**

Britain, Cyprus and Malta are entitled, as Council of Europe Members, to become parties to the Convention. Canada is entitled to become a party as a non-member state which participated in its elaboration. Any party may specify territories to which the Convention shall apply.

After entry into force of the Convention, states other than those entitled to become parties, may be invited to accede to the Convention. Invitations are issued by the Committee of Ministers of the Council of Europe, after consulting with the contracting states. Invitation must have the unanimous agreement of contracting states entitled to sit on the Committee of Ministers and be supported by the majority provided in Article 20.d of the Statute of the Council of Europe.

## **Costs of membership of the Convention**

States parties to the Convention which are not already members of GRECO automatically become members of GRECO at the time the Convention enters into force for them. The Enlarged Partial Agreement (EPA) establishing GRECO provides that the Budget of GRECO comprises, *inter alia*, the annual compulsory contributions of each member of the Group. The travel and subsistence costs of one representative of each party in meetings of the Group and the costs of mutual evaluation are met out of the budget of the Group.

In addition to the cost of participation in GRECO, states parties will incur the domestic cost of passing the laws necessary to implement the Convention. Like the OECD Convention, provision of facilities for extradition and mutual assistance in criminal matters are likely to involve some cost to participating countries.

## **Legislative initiatives required by the Convention**

The majority of Commonwealth countries will need to amend existing laws or enact new laws and to establish administrative mechanisms in order to meet obligations imposed by the Convention. The following are the principal areas not covered, or inadequately covered, by existing national laws of many member countries:

- ◆ the criminalisation of the offence of bribing foreign public officials; members of foreign public assemblies: those involved in business activity in the private sector; employees, those under contract to and persons seconded to public international or supra-national organisations or bodies of which the state party is a

member; members of international parliamentary assemblies; and judges and officials of international courts.

- ◆ the criminalisation of trading in influence;
- ◆ the scope of predicate offences for money laundering;
- ◆ the existence or scope of corporate criminal liability;
- ◆ the existence or scope of accounting offences;
- ◆ the extent of jurisdiction of courts to deal with offences by nationals including those who work with or for, or are officials of international organisations, courts or parliamentary assemblies;
- ◆ the extension of laws relating to the confiscation or forfeiture of the proceeds of bribery;
- ◆ the existence of specialist independent persons or entities to combat corruption;
- ◆ passage of “whistle-blowing” legislation and witness protection provisions;
- ◆ the scope of limitations to bank secrecy laws.

### **Proposed extension of the Council of Europe Convention regime**

The Council of Europe Criminal Law Convention on Corruption is to be supplemented by other conventions including an important instrument on civil law. Ultimately, it is reasonable to assume that the CoE programme of action against corruption will be supported by a comprehensive regime of international instruments designed to address all aspects of corruption as it relates to governance and to commercial activity. It is also expected that the GRECO will exercise functions in respect of subsequent conventions.

### **Limitations of the Council of Europe Convention**

Commonwealth country participation in any of the Council of Europe’s proposed conventions on corruption is dependent upon agreement by all states parties to any relevant convention and upon agreement by the Council of Ministers of the Council of Europe. Whilst it is probable that some Commonwealth country participation will be welcomed it is not by any means sure that all Commonwealth countries will find themselves able to become states parties to any of the proposed Conventions.

While participation in the CoE corruption convention regime will undoubtedly ensure that any Commonwealth country has a comprehensive and internationally monitored programme of action against corruption covering criminal, civil and administrative issues and other issues of concern to the Commonwealth such as the establishment of codes of official conduct, the question whether the greater Commonwealth interest in fostering good governance, eliminating corruption and improving economic management will be furthered by the participation of some member countries is a question which remains to be answered.

Without knowing the cost of participating in GRECO (which is mandatory for participation in the criminal law convention and may be mandatory in respect of future conventions) it is difficult to say whether many Commonwealth countries would find it possible, within resource constraints, to participate in the European regime.

Amendments to the Convention may be proposed by any state party and the Committee of Ministers of the Council of Europe must consult with non-member states parties before adopting amendments.

## The Inter-American Convention Against Corruption 1996

The Inter-American Convention was concluded in March 1996 and its expressed purposes are to promote and strengthen the development by states parties of mechanisms needed to prevent, detect, punish and eradicate corruption and to promote co-operation among states to ensure the effectiveness of anti-corruption measures. It covers the performance of “public functions” which are widely defined so as to include any temporary or permanent, paid or honorary activity performed in the name of the State or in the service of the State.

The substantive provisions of the Inter-American Convention require states parties to consider measures to maintain and strengthen:

- ◆ the introduction and enforcement of standards of conduct designed to prevent conflict of interest and to conserve properly and use the resources entrusted to government officials in the performance of their functions so as to preserve public confidence in the integrity of public servants and government processes;
- ◆ public sector ethics;
- ◆ the registration of pecuniary interest of persons performing public functions;

- ◆ public procurement systems;
- ◆ government revenue collection and control systems which deter corruption;
- ◆ laws which deny favourable tax treatment to those who violate anti-corruption laws;
- ◆ reporting of corruption by public servants and citizens;
- ◆ oversight bodies to implement modern anti-corruption strategies;
- ◆ deterrents to bribery, including accurate financial records;
- ◆ mechanisms to encourage the participation of civil society in anti-corruption efforts;
- ◆ the study of further preventive measures such as the relationship between equitable compensation and probity in public service.

Substantively the Convention requires states parties to establish as criminal offences the direct or indirect solicitation or acceptance or offering of any article of monetary value or other benefit by any government official or person (on his or her own behalf or for any other person) who performs a public function in exchange for any act or omission in the performance of a public function.

The fraudulent use or concealment of property derived from corrupt activity is to be criminalised, as are inchoate offences related to corruption and trading in influence.

Jurisdiction must be asserted over offences committed within the territory of a state part and may be asserted where the offence is committed elsewhere by a national or habitual resident. If extradition of an alleged offender is refused, jurisdiction must be assumed.

Bribery of foreign government officials by a national, resident business or habitual resident is to be criminalised in accordance with the Constitutional and fundamental legal principles of states parties.

States parties are also to criminalise certain types of conduct not dealt with by other multilateral conventions including:

- ◆ illicit enrichment which cannot be reasonably explained;
- ◆ improper use of classified or confidential information and state property;
- ◆ diversion of state property.

Extradition, mutual assistance and proceeds of crime laws must support corruption laws, and bank secrecy laws must not inhibit the investigation or prosecution of corruption offences.

### **Countries entitled to become states parties**

All members of the Organization of American States may become parties to the Convention and the Convention is open for accession by *any* other state.

The Commonwealth countries eligible as members of the OAS are Canada, Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St Lucia, St Kitts and Nevis, St Vincent and the Grenadines, and Trinidad and Tobago.

### **Costs of membership of the OAS Convention**

Unlike the OECD and Council of Europe Conventions, the OAS Convention does not have a body which monitors its implementation and accordingly there are no costs involved other than those incurred in the development, passage and implementation of legislation to give effect to the Convention.

### **Legislative initiatives required by the OAS Convention**

The following are the principal areas in which Commonwealth countries would need to enact additional or amending legislation to implement the mandatory provisions of the Convention:

- ◆ criminalisation of the fraudulent use or concealment of property derived from corrupt activity;
- ◆ criminalisation of trading in influence;
- ◆ power to prosecute in lieu of extraditing;
- ◆ criminalisation of bribery of foreign government officials;
- ◆ criminalisation of improper use of classified or confidential information and state property, and diversion of state property;
- ◆ criminalisation of illicit enrichment which cannot be reasonably explained;
- ◆ amendment or enactment of extradition, mutual assistance and proceeds of crime and bank secrecy laws.

Non-mandatory provisions of the Convention which should be the subject of action by states parties if the full spirit of the Convention is to be achieved relate, inter alia, to :

- ◆ standards of conduct designed to prevent conflict of interest and to conserve properly and use the resources entrusted to government officials and the introduction of registers of pecuniary interests by relevant officials;
- ◆ public procurement and government revenue collection and control systems which deter corruption;
- ◆ the creation or enhancement of oversight bodies to implement modern anti-corruption strategies;
- ◆ mechanisms to encourage the participation of civil society in anti-corruption efforts;
- ◆ the study of further preventive measures such as the relationship between equitable compensation and probity in public service.

### **Limitations of the OAS Convention**

The OAS Convention addresses many, if not most, of the issues of concern to Commonwealth countries and if it has any limitations these may be that in certain areas it imposes no obligations, but rather exhorts states parties to consider action in areas such as public procurement which are of particular concern to the Commonwealth in its work on economic management. Certainly its reference to public education and participation in anti-corruption strategies and its consideration of the relationship between remuneration and probity reflect issues discussed in Commonwealth fora.

Although any state party may propose draft additional protocols to the Convention these are only considered at meetings of the General Assembly of the OAS.

## **Possible Development of a Commonwealth Instrument on Corruption**

### **Legal foundations of the Commonwealth**

The Commonwealth, unlike the other organisations whose instruments have been considered, is not formed by treaty and no Commonwealth concern has yet been the subject of any agreement enforceable at international law. The Commonwealth's reliance on consensus to achieve

agreement on issues of common concern is a fundamental precept of the organisation. Its reliance on the Secretary-General's Good Offices Role to resolve problems is one of the organisation's strengths. One of the issues which arises for consideration, therefore, is whether the development of a formal Commonwealth mechanism or instrument to combat corruption is consistent with the fundamental nature of the Commonwealth as an organisation.

### **Commonwealth co-operation**

Notwithstanding that the Commonwealth has no agreements enforceable at international law – that is, no treaties or conventions, Commonwealth Law Ministers have, for 32 years, relied on “schemes” to facilitate co-operation between member countries. The first scheme developed in 1966 related to extradition. Subsequent schemes agreed in 1986 and 1993 deal with mutual assistance in criminal matters, the transfer of convicted offenders and the protection of material cultural heritage. These schemes contemplate the enactment of laws in all member countries which permit the granting of assistance to other members in the subject areas. In the area of extradition, the Scheme has enjoyed significant success with the vast majority of member countries governing their extradition relations under the London Scheme on the Rendition of Fugitive Offenders. The other Schemes are being progressively implemented by member countries.

While having no enforceable effect at international law, the Schemes evidence the willingness and ability of the vast majority of Commonwealth members to assume, between themselves, moral obligations which they are prepared to treat as binding and as an essential concomitant of their membership of the Commonwealth.

The Commonwealth is a fully fledged intergovernmental organisation. It enjoys recognition by all other intergovernmental organisations and has, or may exercise, observer rights at many of them. Its standing in the international community is such that the Commonwealth Schemes are recognised as effective contributions to, and often as leading global practice in the areas they cover. The Commonwealth Schemes on extradition and mutual assistance in criminal matters have strongly influenced instruments developed by the United Nations in these areas. There is, therefore, every reason to believe that a Commonwealth instrument evidencing the organisation's commitment to good governance and the elimination of corruption would be accorded status no less than any other developed under the auspices of an intergovernmental organisation.

One particular feature of the Schemes is that they have been devised primarily to address issues relating to international co-operation and have not, other than in this context, addressed issues of internal governance of member countries. The question therefore arises whether a Scheme, in the sense that that word is understood in the Commonwealth family, would or could be an appropriate means of evidencing agreed Commonwealth principles relating to the elimination of corruption.

### **A possible non-binding Commonwealth instrument**

Given the status accorded to Commonwealth Schemes among the international community, member countries could choose to evidence their individual and collective commitment to combating corruption by an instrument of less than treaty status. They could do so in one of two ways:

- ◆ by concluding an instrument of less than treaty status which covers all the issues and which contemplates the enactment of national laws to give effect to the commitments outlined in the instrument; or
- ◆ by issuing a declaration or adopting a statement of principles, as was done in Singapore in 1971 and in Harare in 1991.

An instrument of less than treaty status (bearing some small resemblance to the existing Commonwealth Schemes, but of far wider application and impacting on domestic governance) may only be possible to conclude in the same way as would a treaty, or indeed the Schemes themselves, by being the subject of negotiation at senior official level before adoption by Ministers. An instrument of this nature would be in accord with Commonwealth practice. It would reflect those issues upon which consensus was reached and would contain no provisions relating to signature, ratification or denunciation.

A Commonwealth Declaration could assume whatever importance was considered appropriate by Heads of Government. Its provisions could be made on a par with declarations of other Commonwealth fundamental principles and observance of the terms of the Declaration could, conceivably, be the subject of pan-Commonwealth concern. Obviously, equally, a statement of principles or declaration could be accorded a status less than that accorded to the Harare Principles. A decision on such an issue is one solely for the sovereign states which are members of the Commonwealth.