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# The New Crimes of Bribery in Scotland

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## Introduction

The Bribery Act 2010, enacted in the wash-up prior to the dissolution of Parliament, will completely change the Scots law on bribery. As discussed in *The Crime of Bribery in Scotland* 2009 SLT 1 by the present author a number of criticisms have been directed at the previous law and practice on bribery. These relate to the opacity of the law itself and its apparent conflict with the United Kingdom's international obligations. In regard to the latter, the OECD stated in a report published in October 2008 that it was "... disappointed and seriously concerned with the unsatisfactory implementation of the Convention [on Combating Bribery of Foreign Public Officials in International Business Transactions] by the UK. The continued failure of the UK to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery has hindered investigations". Both the objective deficiencies of the law on bribery and its putative non-conformity with international law are addressed by the Act.

## Brief History

The genesis of the Bribery Act 2010 can be traced back fifteen years to the Nolan Committee's *Report on Standards in Public Life* in 1995. As the Explanatory Notes to the Bribery Act 2010 explain, this set in motion a series of developments which culminated in the Act. These include the Law Commission of England and Wales Report *Legislating the Criminal Code: Corruption* in 1998 and draft Corruption Bill in 2003. Following the 2003 draft Bill there was a *Joint Committee of Parliament Report, the Joint Committee on the Draft Corruption Bill Session 2002-03 Report and Evidence* and Governmental response. This in turn led to a consultation exercise *Bribery: Reform of the Prevention of Corruption Acts and SFO powers in cases of bribery of foreign officials* in 2005. The matter was then sent to the Law Commission of England and Wales a second time. It issued a consultation paper in 2007 and then report, *Reforming Bribery*, in November 2008. The Government presented the draft Bribery Bill to Parliament on 25 March 2009, largely relying on the Law

Commission's report. Royal Assent was given to the Bribery Bill on 8 April 2010.

The Bribery Act 2010 will enter into force on such days as the Secretary of State shall by statutory instrument appoint. Most commentators suggest that this is likely to happen in the late autumn. It should be noted, however, that section 9 of the Act obliges the Secretary of State to publish guidance on the 'adequate procedures' defence applicable to the corporate offence, mentioned below. The then Parliamentary Under-Secretary of State for Justice (Claire Ward) has said that the publication of guidance will precede that section being brought into force "The new criminal offences will be brought into force by a commencement order by the Secretary of State. As I have indicated, we will not commence the new offence of the failure on the part of a commercial organisation to prevent bribery until we have published the relevant guidance for commercial organisations... Such guidance will be available well in advance of the legislation coming into force...

That being the case, we do not envisage bringing that offence into force before 1 October 2010 at the earliest." (Hansard, HC Public Bill Committee, March 18, 2010, col.151). The Act is not retrospective, so any alleged acts of bribery taking place prior to its entry into force will be governed by the law as it presently stands.

### **The Bribery Act 2010 in Scotland**

The passage of the Bribery Act 2010 – if it was to apply in Scotland – necessarily entailed the involvement of the Scottish Parliament. This is simply because the Act creates criminal offences, the criminal law is devolved and the Sewel Convention requires the consent of the Scottish Parliament where the United Kingdom Parliament is proposing to make provision on matters within its legislative competence. This agreement, taking the form of a Legislative Consent Motion, was given by the Scottish Parliament on 11 February 2010. Whilst the Act clearly relates to matters within the competence of the Scottish Parliament it also concerns reserved matters. This follows the law relating to bribery being to some considerable measure affected by the international legal obligations upon the United Kingdom – international relations, of course, being reserved. In this way it is akin to certain of the criminally-related international obligations upon the United Kingdom and Scotland following ratification of the Rome Statute for the International Criminal Court in 2001. Clearly illustrating the relationship between international law and the Bribery Act 2010 is paragraph 3 of the Scottish Executive's Memorandum in support of the Legislative Consent Motion stating "The Bribery Bill aims to provide a clearer and more effective legal framework to combat bribery in both the public and private sectors and will assist the United Kingdom, including Scotland, in more effectively fulfilling international

obligations".

The rationale given by the Scottish Executive for proposing that the UK Parliament act in regard to bribery is found in the November 2009 Legislative Consent Memorandum. It gives as reasons "... the importance of ensuring that a consistent approach to bribery and corruption reform is taken throughout the United Kingdom. Uniformity across the UK would provide a more effective and workable legislative framework than would be possible if separate legislation were introduced in the two Parliaments. It would also help to ensure that Scotland does not fall behind the rest of the UK in reforming this area of the law and would avoid the situation whereby the current deficiencies in the law remain in Scotland for longer than is necessary". It is worth noting that a consultation led by the Scottish Executive on bribery and corruption based on the United Kingdom's then draft Bribery Bill preceded the approval of the Legislative Consent Motion by the Scottish Parliament. The Legislative Consent Memorandum notes that there was a very limited response to the call for comment, with only six written responses being received. It further states that the general view was in favour of reform and that that reform should be consistent with changes in the rest of the United Kingdom. The only response to object to reform was from the Law Society, which "... questioned why a reform of the law was necessary and expressed concern that any proposed rationalisation would detract from the flexibility of the common law".

### **The Act**

The Bribery Act 2010 applies throughout the United Kingdom. It affects a whole-scale change to the law relating to bribery – by repealing all the previous law and replacing it. Repealed will be the crimes relating to bribery existing

in Scotland at common law and under statute. The common law provides that it is a crime to bribe and attempt to bribe a judicial officer and for the officer himself to take a bribe (Hume *Commentaries* 1, 407, 408). The statutory offences are presently found in the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906. Both the common law and statutory crimes are given extraterritorial affect by s 68(1) of the Criminal Justice (Scotland) Act 2003. Being introduced in place of these crimes are two general bribery offences, an offence of the bribery of a foreign public official and a corporate offence of failing to prevent bribery. The general offences cover the direct or indirect offering, promising or giving of a financial or other advantage (in section 1) and the requesting, agreeing to receive or receiving of a financial or other advantage (in section 2). A requirement is that the offering, requesting etcetera must take place in circumstances amounting to the improper performance of a relevant function or activity. Section 3(2) provides that a relevant function or activity are "any function of a public nature, any activity connected with a business, any activity performed in the course of a person's employment, and any activity performed by or on behalf of a body of persons (whether corporate or unincorporate)". The performance of a relevant function or activity is 'improper' if it breaches a 'relevant expectation' in that it is not performed in good faith, impartially or it breaches a position of trust – by sections 3, 4 and 5. Section 5(1) provides that when deciding what is expected of a person the test that is to be applied is what a reasonable person in the UK would expect in relation to the performance. Generally, these offences cover both public and private functions and eschew previous reliance upon an agent/principal relationship. They

## The New Crimes of Bribery in Scotland – *continued*

instead centre upon the intention to induce improper conduct.

A third offence created by the Bribery Act 2010 is that of the bribery of a foreign public official. This replaces the crime under Section 1 of the Public Bodies Corrupt Practices Act 1889, as amended. Under section 6 of the Bribery Act 2010 it is an offence for a person to bribe a foreign official (promise or give a financial or other advantage) with an intention to influence him in his capacity as such. The offence requires an intention to obtain or retain business or an advantage in the conduct of business. Further, the offence requires the prosecution to prove that the foreign official was not permitted nor required by law to be influenced. Jurisdictionally, the crimes under sections 1, 2, and 6 apply if either a territorial or relationship connection between the alleged offender or crime and the United Kingdom exists. Territorially, section 12 provides that if any act or omission which forms part of the offence takes place in any part of the United Kingdom then the offence is committed within that part. Section 12 also states that an offence is committed if a person's acts or omissions would comprise the offence but for it taking place outside the United Kingdom and that person has a close connection with the United Kingdom. A person or entity has a close connection if he or it is a citizen, resident, body corporate or partnership of or within the United Kingdom. Section 14 of the Act provides that in addition to bodies corporate and Scottish partnerships being capable of committing the offences under sections 1, 2, and 6 senior officers and partners shall also be liable if the offence was committed with that person's consent or connivance.

The fourth and perhaps most notable offence under the Bribery Act 2010 is a new crime, and one

not suggested by the Law Commission in its 2008 Report. It is found in section 7. It criminalises relevant commercial organisations for the failure to prevent bribery. The offence is committed when a person associated with a commercial organisation bribes another person and that person intends to obtain or retain business or an advantage in the conduct of business. This is a strict liability offence, with commercial organisations being liable for bribery when committed by associated persons. An associated person is one who performs services on behalf of the organisation, he or she need not have any connection with the UK. Section 7(5) defines relevant commercial organisations as those which are incorporated within the United Kingdom or carry on business or part of a business within it. Significantly section 7(2) provides that it is a defence where a company can prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct. As noted, the Act requires the Secretary of State to publish guidance that relevant commercial organisations can put in place to prevent persons associated with them from bribing.

The final notable provisions within the Bribery Act 2010 include a defence for conduct that would amount to bribery where that conduct was necessary for the proper exercise of any function of the armed services and intelligence services, by section 13. In regard to the penalties for the offences under the Act, section 11 provides that an individual convicted under sections 1, 2 or 6 is liable to a prison sentence of a maximum of ten years and an unlimited fine. A body corporate or partnership convicted under section 7 is liable to an unlimited fine. In addition the ramifications of a conviction under sections 1, 2 or 6 could also be quite severe commercially in it would entail the exclusion of a

body corporate from public sector contracts for five years, under article 45 of the EU Public Sector Directive. More generally, the Act is notable in that it adopts a no-exception approach to bribery, including 'facilitation payments' and corporate hospitality. In this sense the Act is more strict than the Foreign Corrupt Practices Act 1977 of the United States. However, as was noted by Claire Ward during the passage of the Act "Each case must be considered on its own facts and merits, but the more serious the offence, the more likely it is that prosecution will be needed in the public interest" (Hansard 3 March 2011 col 979). In Scotland decisions on prosecution will be made by the Lord Advocate in the light of the Prosecution Code. This provides that the Lord Advocate, where the alleged acts are known to the criminal law and where there is sufficient admissible evidence to commence proceedings, must take into account the public interest in coming to a decision to prosecute. This may well lead to decisions not to prosecute where an individual, partnership or body corporate has made relatively minor facilitation payments or provided corporate hospitality. However, it is clear that considerable uncertainty exists in the area although the guidance may clarify matters somewhat in regard to the corporate offence. In regard to which, partnerships and bodies corporate would be wise to adopt a thorough and robust anti-bribery policy – following the guidance closely.

### Conclusion

The Bribery Act 2010 is to be welcomed. It modernises the law and brings it together in a single statute. It should allow businesses and individuals based in Scotland to adopt policies and condition their behaviour accordingly – wherever their activities take place. The Act in a general sense brings the United Kingdom closer to the practice of the United States,

the latter having prohibited and vigorously prosecuted bribery and corruption at home and abroad for some considerable time. Indeed a coming together in practice was evident before the Act, as seen in the renewed vigour on the part of the Serious Fraud Office in investigating and prosecuting bribery and corruption. For example the SFO secured its first corporate criminal conviction for overseas corruption in 2009, that of the firm Mabey and Johnson, and agreed a settlement with BAE Systems after a plea bargain in early 2010. In contrast to England, there has not been a recent increase in

prosecutions in Scotland. Over the years 2006/07, 2007/08 and 2008/09 the numbers of bribery or corruption offences that have been recorded in Scotland are three, three and one respectively (Scottish Parliament Justice Committee Report 19 Jan. 2010 col 2622). This interesting fact may be interpreted in one of three ways; that the complex and piecemeal nature of the law led to prosecutions being overly difficult, that the Prosecution Code's evidential and public interest factors militated against prosecution or finally that instances of bribery in Scotland and by Scots and

Scottish-based companies are in fact rare. Supporting the final view is Bill Aitken who, as the Convener of the Justice Committee examining the Bribery Bill, concluded with the statement "I think that on the basis of the minister's evidence we are reassured that Scotland is a nation of sea-green incorruptibles (Scottish Parliament Justice Committee Report 19 Jan. 2010 col 2626). Whatever the position – and it can be reasonably assumed that all three interpretations have some merit – only time will tell whether the Bribery Act 2010 will result in increased Scottish prosecutions.