

J. ALLCOCK & SONS LTD.,
Incorporating
WELLINGTON RUBBER CO. LTD

Registered Office:

TEXTILE STREET, WEST GORTON, MANCHESTER M12 5DL.

Tel: 0161 223 7181 Fax: 0161 223 0173

www.allcocks.co.uk

BRIBERY ACT 2010

EXPLANATORY NOTES

INTRODUCTION:

1. These notes refer to the Bribery Act 2010, which received Royal Assent on 8th. April 2010. They were prepared by the Ministry of Justice to assist readers in understanding the Act. They don't form part of the Act and have not been endorsed by Parliament.
2. The notes must be read in conjunction with the Act. They are not, and are not meant to be, a full description of the Act. So where a section, or part of a section, does not seem to need an explanation, none is given.

SUMMARY:

3. The purpose of the Act is to reform the criminal law of bribery to provide for a new consolidated scheme of bribery offences to cover bribery both in the UK and abroad.
4. The Act replaces the common law offences and under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 (known generally as the Prevention of Corruption Acts 1889 to 1916) with two general offences. The first covers the offering, promising or giving of an advantage (broadly, offences of bribing another person). The second deals with the requesting, agreeing to receive or accepting of an advantage (broadly, offences of being bribed). The formulation of these two offences abandons the agent / principal relationship on which the previous law was based, in favour of a model based on the intention to induce improper conduct. The Act also creates a discrete offences of bribery of a foreign public official and a new offences where a commercial organisation fails to prevent bribery.



5. The other main provisions of the Act include:

- Replacing the requirement for the Attorney General's consent to prosecute a bribery offence with a requirement that the offences in the Act may only be instituted by, or with the consent of, the Director of the relevant prosecuting authority.
- A maximum penalty of 10 years imprisonment for all the offences, except the offences relating to commercial organisations, which will carry an unlimited fine.

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- Extra-territorial jurisdiction to prosecute bribery committed abroad by persons ordinarily resident in the UK as well as UK nationals and UK corporate bodies;
- A defence for conduct that would constitute a bribery offence where the conduct was necessary for the proper exercise of any function of the intelligence services or the armed forces engaged on active service.

BACKGROUND

6. The reform of the law on bribery dates back to the Nolan Committee's *Report on Standards in Public Life in 1995 (Cm 28501)*, which was set up in response to concerns about unethical conduct by those in public office, and its suggestion that a Law Commission might usefully take forward the consolidation of the statute law on bribery. The Law Commission first made proposals for reform of bribery in a 1998 report (*Legislating the Criminal Code: Corruption, Report No. 248*).

7. The Government then set up a working party of stakeholders which met over the period 1998 – 2000, and this was followed in June 2000 by a Government White Paper on corruption (*Raising Standards and Upholding Integrity: the prevention of Corruption Cm 4759*). This was positively received and led to the publication of a draft Corruption Bill 1n 2003 (*Corruption Draft Legislation Cm 5777*). That draft Bill was then subjected to pre-legislative scrutiny by a Joint Committee of Parliament which reported in July 2003 (*Joint Committee on the Draft Corruption Bill Session 2002-03 Report and Evidence HL 157, HC 705*). The draft Bill failed to win broad support, in particular the Joint Committee was critical of the retention of the agent / principal relationship as a basis for the offence.



8. The Government responded in December 2003 (*The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill etc etc*). In its response, the Government accepted the recommendations in part but expressed reservations about the suggestions made by the Committee in relation to how the offences should be structured given its rejection of the principal/agent model. A Government consultation exercise, *Bribery: Reform of the Prevention of Corruption Acts and SFO powers in cases of bribery of foreign officials*, followed in 2005. The Government concluded that, although there remained support for reform, there was no clear consensus on the form it should take. It was therefore decided to refer the matter back to the Law Commission for a further review.

9. The Law Commission's terms of reference were to consider the full range of options for consolidating and reforming the law on bribery. The Law Commission issued a consultation paper, *Reforming Bribery* (Consultation Paper No. 185), in October 2007. The Law Commission published its report *Reforming Bribery* (Report No. 313) on 20 Nov 2008.

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10. The Government presented a draft Bribery Bill (Cm 7570) to Parliament on 25 March 2009 which built on the proposal in the Law Commission's report. A Joint Committee of Parliament was established to undertake pre-legislative scrutiny of the draft Bill. It reported on 28 July 2009 (*Joint Committee on the Draft Bribery Bill. First Report, Session 2008-09, HL 115, HC430 – I & II*). The Government responded to the Joint Committee's report on 20 Nov 2009 (*Government Response etc di da etc*)

TERRITORIAL EXTENT

11. Section 18 sets out the territorial extent of the Act. Its main substantive provisions extend throughout the UK

12. / 13. / 14. Cover the agreements concerning Scotland, Wales and Northern Ireland with deference to their local Rules and Laws.



COMMENTARY ON SECTIONS

SECTION 1: Offences of bribing another person

15. This section defines the offence of bribery as it applies to the person who offers, promises or gives a financial or other advantage to another. That person is referred to in the section as P. The meaning of “financial or other advantage” is left to be determined as a matter of common sense by the tribunal of fact. Section 1 distinguishes two classes: Case 1 (*subsection (2)*) and Case 2 (*subsection (3)*).

16. Case 1 concerns cases in which the advantage is intended to bring about an improper performance by another person of a relevant function or activity, or to reward such improper performances. The nature of a “relevant function or activity” is addressed in section 3. The nature of “improper performance” is defined in section 4.

17. It is sufficient for the purposes of the offence that P intended to induce or reward impropriety in relation to a function or activity falling within section 3(2) to (5). It is not necessary that the person to whom the advantage is offered, promised or given be the same as the person who is to engage in the improper performance of an activity or function, or who has already done so (*subsection (4)*).

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18. Case 2 concerns cases in which P knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a function or activity as defined in section 3.

19. *Subsection (5)* makes it clear that, in Cases 1 and 2, the advantage can be offered, promised or given by P directly or through someone else.

Section 2: Offences relating to being bribed

20. This section defines the offence of bribery, as it applies to the recipient or potential recipient of the bribe, who is called R. It distinguishes four cases, namely Case 3 to Case 6.

21. In cases 3, 4 and 5 there is a requirement that R “requests, agrees to receive or accepts” an advantage, whether or not R actually receives it. This requirement must then be linked with the “improper performance” of a relevant function or activity. As with section 1, the nature of this function or activity is addressed in section 3, and “improper performance” is defined in section 4.



22. The link between the request, agreement to receive or acceptance of an advantage and improper performance may take three forms:

- R may intend improper performance to follow as a consequence of the request, agreement to receive or acceptance of the advantage (Case 3, in *subsection (2)*);
- Requesting , agreeing to receive or accepting the advantage may in itself amount to improper performance of the relevant function or activity (Case 4, in *subsection (3)*);
- Alternatively , the advantage may be a reward for performing the function or activity improperly (Case 5, in *subsection (4)*).

23. In Cases 3 and 5, it does not matter whether the improper performance is by R or by another person. In Case 4, it must be R's requesting, agreeing to receive or acceptance of the advantage which amounts to improper performance, subject to *subsection (6)*.

24. In Case 6 (*subsection (5)*) what is required is improper performance by R (or another person, where R requests it, assents to or acquiesces in it). This performance must be in anticipation or in a consequence of a request, agreement to receive or acceptance of an advantage.

25. *Subsection (6) is concerned with the role of R in requesting, agreeing to receive or accepting advantages, or in benefiting from them, in Cases 3 to 6. First, this subsection makes it clear that in Cases 3 to 6 it does not matter whether it is R, or someone else through whom R acts, who requests, agrees to receive or accepts the advantage (subsection*

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(6) (a)). Secondly, *subsection (6)* indicates that the advantage can be for the benefit of R, or of another person (*subsection (6) (b)*).

26. *Subsection (7)* makes it clear that in Cases 4 to 6, it is immaterial whether R knows or believes that the performance of the function is improper. Additionally, by *subsection (8)*, in Case 6 where the function or activity is performed by another person, it is immaterial whether that person knew or believed that the performance of the function is improper.

Section 3: Function or activity to which bribe relates

27. This section defines the fields within which the bribery can take place, in other words the types of function or activity that can be improperly performed for the purposes of sections 1 and 2. The term "relevant function or activity" is used for this purpose.



28. The purpose of the section is to ensure that the law of bribery applies equally to public and to selected private functions without discriminating between the two. Accordingly the functions or activities in question include all functions of a public nature and all activities connected with a business, trade or profession. The phrase “functions of a public nature” is the same phrase as is used in the definition of “public authority” in section 6(3)(b) of the Human Rights Act 1998 but is not limited in the way it is in that Act. In addition, the functions or activities include all activities performed either in the course of employment or on behalf of any body of persons: these two categories straddle the public/private divide.

29. Not every defective performance of one these functions for reward or in the hope of advantage engages the law of bribery. *Subsections (3) to (5)* make clear that there must be an expectation that the functions be carried out in good faith (condition A), or impartially (condition B), or the person performing it must be in a position of trust (condition C).

30. *Subsection (6)* provides that the functions or activities in question may be carried out either in the UK or abroad, and need have no connection with the UK. This preserves the effect of section 108(1) and (2) of the Anti-terrorism, Crime and Security Act 2001 (which is repealed by the Act).

Section 4: Improper performance to which bribe relates

31. Section 4 defines “improper performance” as performance which breaches a relevant expectation, as mentioned in condition A or B (*subsections (3) and (4)* of section 3 respectively) or any expectation as to the manner in which, or reasons for which, a function or activity satisfying condition C (*subsection (5)* of section 3) will be performed. *Subsection (1)(b)* states that an omission can in some circumstances amount to improper “performance”.

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