

BRIBERY BILL [HL]

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Bribery Bill [HL] as introduced in the House of Lords on 19th November 2009. They have been prepared by the Ministry of Justice in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require explanation or comment, none is given.

SUMMARY

3. The purpose of the Bill is to reform the criminal law of bribery to provide for a new consolidated scheme of bribery offences to cover bribery both in the United Kingdom (UK) and abroad.
4. The Bill replaces the offences at common law and under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 (known collectively as the Prevention of Corruption Acts 1889 to 1916 and which would be repealed: see Schedule 2) with two general offences.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 current law is based in favour of a model based on an intention to induce improper conduct. The Bill also creates a discrete offence of bribery of a foreign public official and a new offence where a commercial organisation fails to prevent bribery.
5. The other main provisions of the Bill include:
 - replacing the existing requirement for the Attorney General's consent to prosecute a bribery offence with a requirement that the offences in the Bill may only be instituted by, or with the consent of, the Director of the relevant prosecuting authority;

*These notes refer to the Bribery Bill [HL]
as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

- a maximum penalty of 10 years imprisonment for all new offences, except the offence relating to commercial organisations, which will carry an unlimited fine;
- 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 prevention, detection or investigation of serious crime by or on behalf of a law enforcement agency, or 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 2850I), which was set up in response to concerns about unethical conduct by those in public office, and its suggestion that the 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 group 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 in 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 the basis for the offence.

8. The Government responded to the Joint Committee's report in December 2003 (*The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill Session 2002-03* HL 157, HC 705, Cm 6068). In its response, the Government accepted the Report's 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

*These notes refer to the Bribery Bill [HL]
as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

Commission published its report *Reforming Bribery* (Report No. 313) on 20th November 2008.

10. The Government presented a draft Bribery Bill (Cm 7570) to Parliament on 25th March 2009 which built on the proposals 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 28th July 2009 (*Joint Committee on the Draft Bribery Bill, First Report, Session 2008-09*, HL115, HC430 – I & II). The Government responded to the Joint Committee's report on 20th November 2009.

TERRITORIAL EXTENT

11. Clause 17 sets out the territorial extent of the Bill. Its main substantive provisions extend throughout the UK.

Territorial application: Scotland

12. At Introduction this Bill triggers the Sewel Convention. In particular, it makes provision concerning the criminal law of Scotland in relation to bribery. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. If there are any amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for these amendments.

Territorial application: Wales

13. The Bill applies to Wales as it does to the rest of the UK. It does not change the position as regards the National Assembly for Wales nor does it affect the powers of the Welsh Ministers.

Territorial application: Northern Ireland

14. The Bill applies to Northern Ireland as it does to the rest of the UK. It does not change the position as regards the Northern Ireland Assembly.

COMMENTARY ON CLAUSES

Clause 1: Offences of bribing another person

15. This clause 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 clause 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. Clause 1 distinguishes two cases: Case 1 (*subsection (2)*) and Case 2 (*subsection (3)*).

*These notes refer to the Bribery Bill [HL]
as introduced in the House of Lords on 19th November 2009 [HL Bill 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 performance. The nature of a “relevant function or activity” is addressed in clause 3. The nature of “improper performance” is defined in clause 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 clause 3(2) to (5). It is not necessary that the person to whom the advantage is offered, promised or given be the same person as the person who is to engage in the improper performance of an activity or function, or who has already done so (*subsection (4)*).

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 clause 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.

Clause 2: Offences relating to being bribed

20. This clause 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 clause 1, the nature of this function or activity is addressed in clause 3, and “improper performance” is defined in clause 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 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)*.

*These notes refer to the Bribery Bill [HL]
as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

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 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 (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.

Clause 3: Function or activity to which bribe relates

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

28. The purpose of the clause 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 it 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 of 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 would be repealed by the Bill).

Clause 4: Improper performance to which bribe relates

31. Clause 4 defines “improper performance” as performance which breaches a relevant expectation, as mentioned in condition A or B (*subsections (3) and (4)* of clause 3

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respectively) or any expectation as to the manner in which, or reasons for which, a function or activity satisfying condition C (*subsection (5)* of clause 3) will be performed. *Subsection (1)(b)* states that an omission can in some circumstances amount to improper “performance”.

32. *Subsection (3)* addresses the case where R is no longer engaged in a given function or activity but still carries out acts related to his or her former function or activity. These acts are treated as done in performance of the function or activity in question.

Clause 5: Expectation test

33. Clause 5 provides that when deciding what is expected of a person performing a function or activity for the purposes of clauses 3 and 4, the test is what a reasonable person in the UK would expect of a person performing the relevant function or activity. *Subsection (2)* makes it clear that in deciding what a reasonable person in the UK would expect in relation to functions or activities the performance of which is not subject to UK laws, local practice and custom must not be taken into account unless such practice or custom is permitted or required by written law. *Subsection (3)* defines what is meant by “written law” for the purposes of this clause.

Clause 6: Bribery of foreign public officials

34. This clause creates a separate offence of bribery of a foreign public official. This offence closely follows the requirements of the Organisation for Economic Cooperation and Development (OECD) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html).

35. Unlike the general bribery offences in clauses 1 and 2, the offence of bribery of a foreign public official only covers the offering, promising or giving of bribes, and not the acceptance of them. The person giving the bribe must intend to influence the recipient in the performance of his or her functions as a public official, and must intend to obtain or retain business or a business advantage.

36. Foreign public officials are defined in *subsection (5)* to include both government officials and those working for international organisations. The definition draws on Article 1.4(a) of the OECD Convention. Similarly, the definition of “public international organisation” in *subsection (6)* draws on Commentary 17 to the OECD Convention.

The conduct element

37. The conduct element of the offence – what a person must do in order to commit the offence – is set out in *subsection (3)*. The offence may be committed in a number of ways.

38. If a person (P) offers, promises or gives any advantage to a foreign public official (F) with the requisite intention (see below), and the written law applicable to F neither permits

*These notes refer to the Bribery Bill [HL]
as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

nor requires F to be influenced in his or her capacity as a foreign public official by the offer, promise or gift, then P commits an offence.

39. The “written law” applicable to F is defined in *subsection (7)* as the law of the relevant part of the UK where the performance of F’s functions would be subject to that law. Where the performance of F’s functions would not be subject to the law of a part of the UK, the written law is either the applicable rules of a public international organisation, or the law of the country or territory in relation to which F is a foreign public official as contained in its written constitution, provision made by or under legislation or judicial decisions that are evidenced in writing.

40. The offence will also be committed if the advantage is offered to someone other than the official, if that happens at the official’s request, or with the official’s assent or acquiescence.

41. It does not matter whether the offer, promise or gift is made directly to the official or through a third party (*subsection (3)(a)*).

42. The language of the OECD Convention is mirrored in the phrases “obtain or retain business” in *subsection (2)* and “offers, promises or gives” and “advantage” in *subsection (3)*, and in the words “public function” in *subsection (5)(b)*.

The fault element

43. The fault element of the offence – what a person must intend in order to commit the offence – is specified in *subsections (1), (2) and (4)*.

44. *Subsections (1) and (4)* have the effect that, in order to commit the offence, a person must intend to influence a foreign public official in the performance of his or her functions as a public official, including any failure to exercise those functions and any use of his or her position, even if he or she does not have authority to use the position in that way.

45. In order to commit the offence a person must also intend to obtain or retain business or an advantage in the conduct of business (*subsection (2)*).

46. The effect of *subsection (8)* is that “business” includes what is done in the course of a trade or profession.

Clause 7: Failure of commercial organisations to prevent bribery

47. Clause 7 creates an offence of failing to prevent bribery which can only be committed by a relevant commercial organisation.

48. “Relevant commercial organisation” is defined (at *subsection (5)*) as:

*These notes refer to the Bribery Bill [HL]
as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

- a body incorporated under the law of any part of the UK and which carries on business whether there or elsewhere,
- a partnership that is formed under the law of any part of the UK and which carries on business there or elsewhere, or
- any other body corporate or partnership wherever incorporated or formed which carries on business in any part of the UK.

49. *Subsection (5)* also provides that “business” includes a trade or profession and includes what is done in the course of a trade or profession.

50. The offence is committed where a person (A) who is associated with the commercial organisation (C) bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for C. *Subsection (2)* provides that it is a defence for the commercial organisation to show it had adequate procedures in place to prevent persons associated with C from committing bribery offences. Although not explicit on the face of the Bill, in accordance with established case law, the standard of proof the defendant would need to discharge is the balance of probabilities.

51. *Subsection (3)* provides that “bribery” in the context of this offence relates only to the offering, promising or giving of a bribe contrary to clauses 1 and 6 (there is no corresponding offence of failure to prevent the taking of bribes). Applying ordinary principles of criminal law, the reference to offences under clause 1 and 6 include being liable for such offences by way of aiding, abetting, counselling or procuring (secondary liability). *Subsection (3)* also makes clear that there is no need for the prosecution to show that the person who committed the bribery offence has already been successfully prosecuted. The prosecution must, however, show that the person would be guilty of the offence were that person prosecuted under this Bill. Finally, *subsection (3)(b)* makes clear that there is no need for A to have a close connection to the UK as defined in clause 11; rather, so long as C falls within the definition of “relevant commercial organisation” that should be enough to provide courts in the UK with jurisdiction.

Clause 8: Section 7: supplementary provision

52. Clause 8 provides that A is associated with C for the purposes of clause 7, if A performs services for, or on behalf of C. It also ensures that clause 7 relates to the actual activities being undertaken by A at the time rather than A’s general position. The clause expressly states that A may be the commercial organisation’s employee, agent or subsidiary. But where A is an employee it is to be presumed that A is performing services for or on behalf of C unless the contrary is shown.

Clause 9: Consent to prosecution

53. A prosecution under the Bill in England and Wales can only be brought with the consent of the Director of one of the three senior prosecuting authorities, that is to say the Director of

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as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions (*subsection (1)*). A prosecution in Northern Ireland can only be brought with the consent of the Director of Public Prosecutions for Northern Ireland or the Director of the Serious Fraud Office (*subsection (2)*). The Director of the Serious Fraud Office may delegate his or her functions under this clause to an authorised member of staff (*subsection (3)*). Other delegation powers already exist for the other Directors.

Clause 10: Penalties

54. Any offence under the Bill committed by an individual under clauses 1, 2 or 6 is punishable either by a fine or imprisonment for up to 10 years (12 months on summary conviction in England and Wales or 6 months in Northern Ireland), or both. An offence committed by a person other than an individual is punishable by a fine. In either case, the fine may be up to the statutory maximum (£5000) if the conviction is summary, and unlimited if it is on indictment. The clause 7 offence can only be tried upon indictment.

55. Section 154 of the Criminal Justice Act 2003, which is not yet in force, sets the maximum sentence that can be imposed by a Magistrates' Court in England and Wales at 12 months. Where an offence under this Bill is committed before section 154 comes into force, the Magistrates' Court's power is limited to 6 months (*subsection (4)(a)*).

Clause 11: Offences under this Act: territorial application

56. *Subsection (1)* provides that the offences in clauses 1, 2 or 6 are committed in any part of the UK if any part of the conduct element takes place in that part of the UK.

57. The effect of *subsections (2) to (4)* is that, even though all the actions in question take place abroad, they still constitute the offence if the person performing them is a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.

58. *Subsection (5)* makes it clear that for the purposes of the offence in clause 7 (failure of commercial organisation to prevent bribery) it is immaterial where the conduct element of the offence occurs.

59. *Subsections (7) to (9)* provide that where proceedings are to be taken in Scotland against a person, such proceedings may be taken in any sheriff court district in which the person is apprehended or in custody, or in such sheriff district as the Lord Advocate may determine.

Clause 12: Defence for certain bribery offences: legitimate purposes

60. Clause 12 deals with the legitimate functions of law enforcement agencies, the intelligence services or the armed forces which may require the use of a financial or other advantage to accomplish the relevant function. The clause provides a defence where a person charged with a relevant bribery offence can prove that it was necessary for:

*These notes refer to the Bribery Bill [HL]
as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

- the prevention, detection or investigation by, or on behalf of, a law enforcement agency of serious crime;
- the proper exercise of any function of one of the intelligence services; or
- the proper exercise of any function of the armed forces when engaged on active service.

Although not explicit on the face of the Bill, in accordance with established case law, the standard of proof the defendant would need to discharge is the balance of probabilities.

61. As well as providing definitions for other terms used in the clause, *subsection (2)* makes it clear that a “relevant bribery offence” means an offence under clause 1 or 2 and related inchoate offences. Applying ordinary principles of criminal law, the reference in the definition of “relevant bribery offence” to offences under clause 1 and 2 include being liable for such offences by way of aiding, abetting, counselling or procuring (secondary liability). “Relevant bribery offence” does not include a clause 1 offence which would also amount to an offence of bribing a foreign public official under clause 6. This addresses concerns raised by the Joint Committee on the 2003 draft Corruption Bill in relation to, in particular, compliance with the UK’s obligations under the OECD Convention (see HL 157 and HC 705, 31st July 2003).

Clause 13: Offences under sections 1, 2 and 6 by bodies corporate

62. Clause 13 is aimed at individuals who consent or connive at bribery, contrary to clause 1, 2 or 6, committed by a body corporate (of any kind) or Scottish partnership. It does not apply to the offence in clause 7.

63. The first step is to ascertain that the body corporate or Scottish partnership has indeed been guilty of an offence under clause 1, 2 or 6. That established, the clause provides that a director, partner or similar senior manager of the body is guilty of the same offence if he or she has consented to or connived in the commission of the offence. In a body corporate managed by its members, the same applies to members. In relation to a Scottish partnership, the provision applies to partners.

64. It should be noted that in this situation, the body corporate and the senior manager are both guilty of the main bribery offence. This clause does not create a separate offence of “consent or connivance”.

65. *Subsection (3)* makes clear that for a “senior officer” or similar person to be guilty he or she must have a close connection to the UK as defined in clause 11(4).

Clause 14: Offences under section 7 by partnerships

66. Clause 14 deals with proceedings for an offence under clause 7 against partnerships. Such proceedings must be brought in the name of the partnership (and not the partners)

*These notes refer to the Bribery Bill [HL]
as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

(*subsection (1)*); certain rules of court and statutory provisions which apply to bodies corporate are deemed to apply to partnerships (*subsection (2)*); and any fine imposed on the partnership on conviction must be paid out of the partnership assets (*subsection (3)*).

Clause 15: Application to the Crown

67. Clause 15 applies the Bill to individuals in the public service of the Crown. Such individuals will therefore be liable to prosecution if their conduct in the discharge of their duties constitutes an offence under the Bill.

Clause 16: Consequential provision

68. This clause abolishes the common law offences of bribery and embracery (bribery etc of jurors), and gives effect to Schedules 1 and 2, which contain consequential amendments and repeals.

69. *Subsections (4) to (10)* of this clause create a power for the Secretary of State (or, as the case may be, Scottish Ministers) to make supplementary, incidental or consequential provision by order. The order making power is subject to the affirmative resolution procedure where it amends primary legislation, otherwise the negative resolution procedure applies.

Clause 17: Extent

70. This clause provides that the Bill extends to the whole of the UK and that any amendments or repeals of a provision of an enactment have the same extent as that provision. However the amendment of and repeals in the Armed Forces Act 2006 do not extend to the Channel Islands and the amendments of the International Criminal Court Act 2001 and the repeal in the Civil Aviation Act 1982 do not extend to the Channel Islands, Isle of Man or the British overseas territories.

Clause 18: Commencement and transitional provision etc.

71. This clause covers commencement. Clauses 15, 16(4) to (10), 17, 18(1) to (4) and 19 come into force on the day the Bill is passed. The remainder of the Bill comes into force by order of the Secretary of State. A commencement order may appoint different days for different purposes and may contain transitory, transitional or saving provisions. The clause also contains express saving provisions so that any offence committed or partly committed before the operative provisions of the Bill come into force must be dealt with under the old law.

Clause 19: Short title

72. This clause deals with citation.

Schedule 1

73. This Schedule contains consequential amendments to other legislation. These are as follows.

*These notes refer to the Bribery Bill [HL]
as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

Ministry of Defence Police Act 1987

74. Section 2 of that Act gives the Ministry of Defence Police the same powers as normal police, in relation to services property or personnel, including with regard to offences involving the bribery of such persons. At present these offences are those under the Prevention of Corruption Acts 1889 to 1916 but the amendment will change that so that they are offences under this Bill instead.

Criminal Justice Act 1987

75. Section 2A of that Act gives the Director of the Serious Fraud Office power to investigate corruption offences. The amendment replaces the references to the Prevention of Corruption Acts with references to offences under this Bill. The offences in question are the bribery of foreign officials (clause 6), and the general bribery offence (clauses 1 and 2) where the functions in question are performed outside or unconnected with the UK.

International Criminal Court Act 2001

76. Section 54 and 61 of that Act set out the relevant domestic offences in relation to the International Criminal Court in the law of England and Wales, and Northern Ireland respectively. The amendments make clear that offences under the Bill are also relevant domestic offences.

International Criminal Court (Scotland) Act 2001

77. Section 4 of that Act sets out the relevant domestic offences under Scots law in relation to the International Criminal Court. The amendment updates the references to the Prevention of Corruption Act 1906 and to the common law by substituting a reference to the offences under the Bill.

Serious Organised Crime and Police Act 2005

78. Chapter 1 of Part 2 of that Act gives investigatory powers to the Director of Public Prosecutions and other prosecuting authorities in relation to offences listed in section 61. This list was amended by SI 2006/1629 to include common law bribery and offences under the Prevention of Corruption Acts. These offences are now being replaced by the offences under the Bill.

79. A similar amendment applies to section 76 (and section 77 in respect of Scotland), which gives the court power to make a financial reporting order in dealing with a person convicted of (among other offences) corruption offences.

Armed Forces Act 2006

80. Schedule 2 of the Armed Forces Act 2006 lists serious civilian offences the possible commission of which, if suspected, must be referred to a service police force. The list of civilian offences is amended to include the offences under the Bill.

*These notes refer to the Bribery Bill [HL]
as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

Serious Crime Act 2007

81. Section 53 of this Act requires the Attorney General's consent prior to commencing proceedings where there is an international element to an offence of encouraging or assisting crime under the 2007 Act. This amendment ensures that the requirement for the Attorney General's consent will not apply in the case of encouraging or assisting bribery by excluding from section 53 any offence to which clause 9 (consent to prosecution) of this Bill applies.

82. The Serious Crime Act creates a power to make a "serious crime prevention order" in relation to offences listed in Schedule 1 of the Act. Part 1 of that Schedule, relating to offences in England and Wales, includes offences under the Prevention of Corruption Acts. The present amendment replaces this reference with offences under clauses 1, 2 and 6 of the Bill. A corresponding amendment is made in Part 2 of the same Schedule in relation to Northern Ireland.

Schedule 2

83. This Schedule contains repeals.

84. The three Prevention of Corruption Acts are repealed in their entirety. These offences are wholly replaced by the offences under the Bill.

85. Criminal Justice Act (Northern Ireland) 1945 (c. 15 (N.I)) – section 22 amends section 4 of the Public Bodies Corrupt Practices Act 1889 and section 2(1) of the Prevention of Corruption Act 1906 to provide for proceedings to be taken in Northern Ireland only with the consent of the Attorney General for Northern Ireland. Given the 1889 and 1906 Acts will be repealed the section will become redundant.

86. Section 112(3) of the Electoral Law Act (Northern Ireland) 1962 (c.14 (N.I.) amended paragraphs (c) and (d) of section 2 of the 1889 Act and will be redundant following the repeal of the 1889 Act.

87. Increase of Fines Act (Northern Ireland) 1967 (c. 29)(N.I.) – section 1(8)(a) and (b) provide that a court may impose a fine whether greater or less than the amount limited by section 2 of the Public Bodies Corrupt Practices Act 1889 or section 1(1) of the Prevention of Corruption Act 1906 respectively. These references will become redundant once those two Acts are repealed.

88. Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968 (c. 28 (N.I.)); the entry in the table in Schedule 2 relating to the Prevention of Corruption Act 1906 increased the penalty in Northern Ireland for the offence under section 1(1) of the 1906 Act from 4 months imprisonment to 6 months imprisonment. That entry will become redundant upon repeal of the 1906 Act.

*These notes refer to the Bribery Bill [HL]
as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

89. Schedule 8 paragraph 1 of Local Government Act (Northern Ireland) 1972 (c.9 (N.I.)) amended the 1889 Act and will be redundant following the repeal of the 1889 Act.
90. Civil Aviation Act 1982 (c. 16) – section 19(1) designates the Civil Aviation Authority as a public authority for the purposes of the Prevention of Corruption Acts 1889-1916 and will be redundant once they are repealed.
91. The Representation of the People Act 1983 - section 165(1) makes certain provision where a candidate at a Parliamentary or local election engages as agent or canvasser an individual who has been convicted and disenfranchised, including under the Public Bodies Corrupt Practices Act 1889. That entry becomes redundant upon repeal of the 1889 Act.
92. Paragraph 1(2) of Schedule 6 to the Housing Associations Act 1985 (c. 69) provides that the Housing Corporation is a public body for the purposes of the Prevention of Corruption Acts 1889 to 1916. That paragraph becomes redundant upon repeal of those Acts.
93. Section 47 of the Criminal Justice Act 1988, which inserts provisions about penalties into the three Prevention of Corruption Acts, is also repealed.
94. Article 14(1) of the Criminal Justice (Evidence etc.) (Northern Ireland) Order 1988 (S.I. 1988/1847 (N.I.17) amended paragraph (a) of section 2 of the 1889 Act and will be redundant following the repeal of the 1889 Act.
95. Paragraph 2 of Schedule 1 to the Enterprise and New Towns (Scotland) Act 1990 (c. 35) provides that Scottish Enterprise and Highlands and Islands Enterprise are public bodies for the purposes of the Prevention of Corruption Acts 1889 to 1916. That paragraph becomes redundant upon repeal of those Acts.
96. Scotland Act 1998 (c. 46) – section 43 provides that the Scottish Parliament shall be a public body for the purposes of the Prevention of Corruption Acts 1889 to 1916. This section will be redundant once those Acts are repealed.
97. Sections 108 to 110 of the Anti-terrorism, Crime and Security Act 2001 (c. 24), which extend the geographical scope of the offences under the Prevention of Corruption Acts 1889 to 1916, are also repealed.
98. Sections 68 and 69 of the Criminal Justice (Scotland) Act 2003 (asp7) – which extend the geographical scope of the offences under the Prevention of Corruption Acts 1889 - 1916, will be redundant once those Acts are repealed.
99. Section 44 of the Government of Wales Act 2006 (c. 32) provides that the Welsh Assembly and the Assembly Commission shall be public bodies for the purposes of the Prevention of Corruption Acts 1889-1916. This section will be redundant once those Acts are repealed.

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as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

100. In the Armed Forces Act 2006, those paragraphs in the list in Schedule 2 which refer to offences under the Prevention of Corruption Acts are repealed. This repeal is a corollary of the amendment to that list in Schedule 1 to this Bill.

101. Section 217(1)(a) of the Local Government and Public Involvement in Health Act 2007 gives the Secretary of State power to define an “entity under the control of a local authority” and an “entity jointly controlled by bodies that include a local authority” for the purposes of section 4(2) of the Prevention of Corruption Act 1916. The 1916 Act would be repealed by the Bill, making section 217(1)(a) redundant. Paragraph 1 of Schedule 14 to the 2007 Act, which contains amendments to the 1916 Act and section 244(4) which makes provision as to the extent of a repeal contained in that paragraph, are also repealed.

102. Housing and Regeneration Act 2008 (c.17) – Schedule 1, paragraph 16 provides that the Home and Communities Agency shall be a public body for the purposes of the Prevention of Corruption Acts 1889 to 1916. This section will be redundant once those Acts are repealed.

FINANCIAL EFFECTS OF THE BILL

103. The Bill’s provisions would result in a net annual increase in costs for the criminal justice system of £2.18m. This is based on an estimate of a small number of additional prosecutions a year arising from the introduction of the new offence relating to commercial organisations.

PUBLIC SERVICE MANPOWER EFFECTS OF THE BILL

104. There are no significant implications for public service manpower.

SUMMARY OF IMPACT ASSESSMENT

105. An impact assessment for the Bill has been published separately (www.justice.gov.uk/publications/bribery-bill.htm). The new offence relating to commercial organisations which fail to prevent bribery is likely to involve a small additional cost to the criminal justice system (as outlined above) but will not give rise to a significant number of new prosecutions. This is because bribery is not a volume crime and there is increasing emphasis in prosecution policy on encouraging organisations that become aware of bribery in their operations to self-refer to the relevant authorities with a view to resolving the matter with a non-criminal disposal. There are no implications for prison places or the legal aid budget from this new offence. For the most part, the other provisions in the Bill represent a reformulation of existing bribery offences. The increase in the maximum sentence of imprisonment for these offences should have a negligible impact in terms of prison places based on the current low levels of offending.

106. The Bill will not impose any significant additional administrative burden on business. The offence relating to commercial organisations is not regulatory in nature although there is

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recognition for good practice in the adequate procedures defence. The intention here is that the offence will have a beneficial effect for corporate governance by encouraging those businesses which have not already done so to adopt adequate procedures to prevent bribery. But this is not a one size fits all approach. The Government does not intend to prescribe the anti-bribery measures to be taken and there will be no monitoring of compliance. The Government would also expect the courts, in determining whether the defence applies, to take into account the size and needs of the particular business being prosecuted.

107. The impact assessment incorporates the results of the small firms' impact test. The adequate procedures defence to the offence relating to commercial organisations is formulated such that it would allow a small company to adopt a proportionate approach, with small firms in low risk sectors able to argue adequate procedures on 'light touch' grounds, for example demonstrating that anti-bribery principles have been fully communicated to its workforce.

108. The new offence will also assist in a number of ways. Clarity of the law should assist businesses in assessing the suitability of their systems and bring efficiency savings through, for example, reducing the cost of risk assessment. An enhanced ethical reputation should allow UK businesses to compete more successfully in international markets. It should also help in the task of persuading other countries to improve their standards and tackling the culture of toleration of bribery that still persists in some parts of the world. Improving the implementation of anti-bribery standards internationally reduces the likelihood of UK businesses being disadvantaged as a result of overseas competitors offering bribes.

109. An equality impact assessment initial screening has been completed and concluded that a full equality impact assessment was not required as the provisions in the Bill would not impact differently on any particular sections of society.

EUROPEAN CONVENTION ON HUMAN RIGHTS

110. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The statement has to be made before Second Reading. Lord Bach, Parliamentary Under Secretary of State for Justice, has made the following statement:

“In my view, the provisions of the Bribery Bill [HL] are compatible with the Convention rights”.

Failing to prevent bribery – defence of adequate procedures

111. Clause 7 would make it an offence for a commercial organisation to fail to prevent a person performing services for or on its behalf from committing certain bribery offences. That person must intend to obtain or retain business, or an advantage in the conduct of business, for the organisation. It would be a defence to a charge under this provision for the organisation to

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prove that it had in place adequate procedures designed to prevent such persons committing bribery offences.

112. Under the defence in clause 7(2), the defendant organisation would have to prove that the defence applies. The legal burden in respect of the defence will therefore fall on the defendant, to be satisfied on the balance of probabilities.

113. Article 6(2) of the Convention requires that every person charged with a criminal offence shall be presumed innocent until proved guilty according to law. Case law has established that, while placing a legal burden in relation to a defence on the defendant may call into question that general proposition, it will be compatible with the Convention where the overall burden of establishing guilt remains with the prosecution and the burden is otherwise reasonable and proportionate.

114. The Government considers that placing such a burden on the defendant in this case is reasonable and proportionate in the circumstances and is compatible with Article 6(2).

115. The aim of the offence is to encourage commercial organisations to take responsibility for the actions of persons performing services for them or on their behalf where those actions are undertaken for the benefit of that organisation. Where the prosecution can show that an offence has in fact been committed by a person for the benefit of the organisation then the organisation will be liable unless it can show that despite the instant case of bribery it generally had adequate procedures in place which, on the whole, were successful in preventing bribery.

116. Placing the legal burden on the defendant is both reasonable and proportionate. The procedures an organisation has in place to prevent bribery being employed on its behalf are a matter that is peculiarly within its own knowledge and control. The organisation will have ready access to the information needed to establish the existence of the defence. In any event, there would be no absolute requirement to prevent bribery. In the light of this, it would be very difficult to place the legal burden on the prosecution to establish the contrary.

117. The Government notes that a substantial burden remains on the prosecution in establishing the offence. It must first prove to the criminal standard that a bribe was paid for the benefit of the organisation. Only once that direct link to the organisation has been made would the burden (on the civil standard) transfer to the defendant. Given that the adequate procedures defence is not prescriptive, it is open to a defendant organisation to adduce evidence which shows that (for example) given the size of the organisation, the particular sector or country in which it operated and the foreseeable risks, its procedures employed to prevent bribery being committed on its behalf were adequate despite the fact of the bribe.

118. The defence was proposed by the Law Commission, which also concluded that the legal burden ought properly to be placed on the defendant organisation.

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as introduced in the House of Lords on 19th November 2009 [HL Bill 3]*

119. In the circumstances therefore the Government considers the reverse burden is compatible with Article 6.

Defence for certain bribery offences: legitimate purposes

120. Clause 12 of the Bill provides for a defence to certain bribery offences where it can be shown that the conduct which would amount to an offence was necessary for:

- the prevention, detection or investigation by, or on behalf of, a law enforcement agency of serious crime,
- the proper exercise of any function of the Security Service, the Secret Intelligence Service or GCHQ, or
- the proper exercise of any function of the armed forces when engaged on active service.

121. As with the defence relating to commercial organisations (clause 7) the legal burden to prove the conduct was necessary shifts to the defence once it is established that an offence has been committed. The Government considers that placing the legal burden on the defendant to establish the defence, in the particular circumstances, is compatible with Article 6(2) of the Convention.

122. The overall burden of establishing guilt remains with the prosecution. The standard of proof which the defence will need to discharge will be on the balance of probabilities. The aim of the defence is to absolve those who perform functions for or on behalf of State bodies from committing offences where it is necessary for them to perform conduct in the course of their functions which may amount to bribery. Those circumstances are expressly limited to cases where there is a compelling need. In addition, showing necessity in the circumstances is something that would be peculiarly within the knowledge of the individual pleading the defence. In any event, it would be very difficult to place the legal burden on the prosecution to establish the contrary, particularly in the circumstances in which it is possible that the circumstances of the defence may be satisfied.

Repeal of the existing law

123. The Government observes that the fact that the existing law of bribery is being repealed arguably has the effect of enhancing human rights.

124. Section 2 of the Prevention of Corruption Act 1906 introduced a presumption of corruption in certain cases involving corruption within the public sector. It applies where it is proved in any prosecution under the Public Bodies Corrupt Practices 1889 or the Prevention of Corruption 1906 Act that any consideration was paid to, given or received by an employee of the Crown, any Government Department or public body by another person (or their agent) seeking to obtain a contract from the Crown. The effect of section 2 is to place the burden of proof onto the defendant to prove on the balance of probabilities, that the relevant payment

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was not given or received corruptly. This means that the defendant bears the legal burden for disproving the ‘corruptly’ element of the offence in the specific circumstances covered by section 2.

125. Concerns have been raised in the past over whether the presumption in section 2 is compatible with Article 6(2). The Law Commission expressed concern around this issue in 1998 (albeit they did not reach a firm conclusion that the provision was not compatible – paragraph 4.77 of *Legislating the Criminal Code: Corruption*, Report No. 248). The Government’s 2005 paper *Bribery – Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials* highlighted the point and pointed out that “the CPS have concluded that the risk of ECHR challenge is so great that they do not in practice rely on the presumption”.

126. The provisions in the Bill will repeal the presumption in section 2 and therefore any possible doubts around the compatibility of the existing law in respect of section 2 will be removed.

COMMENCEMENT

127. As provided by clause 18, clauses 15, 16(4) to (10), 17, 18(1) to (4) and 19 come into force on the day the Bill is passed. The remainder of the clauses come into force by order of the Secretary of State.

BRIBERY BILL [HL]

EXPLANATORY NOTES

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