Contents

INTRODUCTION

1. This handout gives an overview of the measures enacted under the Bribery Act 2010 ("BA 2010").[1]

2. The Act received Royal Assent on the 8th April 2010 and came into force on the 1st July 2011 insofar as the provisions of the Act were not already in force.[2]

3. A copy of the full Act is available online.[3]

4. The anticipated implementation date of April 2011 was delayed after the government announced, in January 2011, a review of the Act.

5. The *Sunday Telegraph* has claimed that "*the Government has bowed to pressure from business and relaxed key elements of the Bribery Act*".[4] This misstates the position. The Act has been implemented in full.

6. Much has been said and written about the BA 2010. While the principal objective of the Act is laudable, the 'letter' of the statute could hardly be stricter and its potential reach is vast (not least its extraterritorial reach). As will be seen, of the four statutory sets of circumstances – "cases" – by which an offence can be committed under section 2 (receiving a bribe), three cases give rise to strict liability. Liability can also be incurred on an accessorial basis (e.g. aiding and abetting, etc.) and inchoately (e.g. conspiracy, criminal attempts, or under Part 2 of the Serious Crime Act 2007).

7. The long term aim of the legislation is to bring about a moral, global, cultural shift away from conduct that aims to secure an unfair advantage by unfair or corrupt means.

8. Needless to say, many organisations and individuals have been scared witless, fearing that they may be at the receiving end of an investigation and, perhaps, prosecution.

9. For those who do face penalties for a breach of the Act, the personal and financial consequences could be severe: high value orders (confiscation orders following

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1 The handout is based on an earlier draft for the LexisNexis Breakfast Briefing "*The Bribery Act*", London, 2nd March 2011, and for the Act Now For London Conference, "*Understanding and Responding to the Bribery Act 2010",* London, 24th May 2011, in collaboration with 25 Bedford Row, London.

2 The Bribery Act 2010 (Commencement) Order 2011 (SI 2011/1418). Note that the following provisions came into force at the time of Royal Assent: ss.16, 17(4)(-(10); 18; 19(1)-(4); and s.20.

3 http://www.legislation.gov.uk/ukpga/2010/23/contents

4 Sunday 27th February 2011.

conviction, or civil recovery orders, under the Proceeds of Crime Act 2002) are possible.

10. Organisations (not just commercial entities) have little choice but to allocate considerable resources in order to comply with the Act.[5] One object-lesson for directors and officers – with particular reference to s.7 of the Act - is that they should not merely examine their insurance policies (as well as the extent of their cover), but that they should check whether they have a policy at all.

11. Although the letter of the law is almost one of zero-tolerance, the buzzword is "proportionality". Unfortunately, the Act itself says little about proportionality. So where do we find it? The answer is in investigative and prosecutorial discretion. Although discretion, as a means of achieving 'balance' in the application of the criminal law, has much to commend it, it is arguable that - in this instance - discretion will mean that many cases will be the subject of negotiated agreements with law enforcement agencies. Those agencies – perhaps more than the judges – will opine on the meaning of key words and phrases, or opine on whether conduct does or does not amount to an offence under the Act. Will organisations chance a 'day in court'? Or will they prefer to settle on terms – and get their chequebooks out to pay an agreed, negotiated, penalty?

Guidance notes

12. In March 2011, the Secretary of State for Justice, pursuant to s.9 of the 2010 Act, has published "*Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing*" (Ministry of Justice).[6]

> ....combating the risks of bribery is largely about common sense, not burdensome procedures. The core principle it sets out is proportionality. It also offers case study examples that help illuminate the application of the Act. Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix. Separately, we are publishing non-statutory 'quick start' guidance.

13. See also the "*Bribery Act 2010: Quick Start Guide*".[7]

14. Section 9 guidance is directed only at "relevant commercial organisations" and its direct relevance is in relation to the s.7 offence (failing to prevent bribery). However, s.7(5) defines "relevant commercial organisation" in terms that excludes the largest group within the business community, namely, sole traders, or

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5 See "*Counting the Cost*", a film written and produced by DLA Piper partner, Duncan Wiggetts: http://www.dlapiperrapidresponse.com/film/

6 http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf

7 http://www.justice.gov.uk/guidance/docs/bribery-act-2010-quick-start-guide.pdf

unincorporated bodies, or groups of self-employed persons acting collectively albeit not in partnership (e.g. some barristers' chambers). Although the s.7 offence will not apply to them, other offences do, and the s.7 offence may be committed on a secondary liability basis.

15. The s.9 guidance is based on six principles:

    1. Proportionate procedures
    2. Top-level commitment
    3. Risk Assessment
    4. Due diligence
    5. Communication (including training)
    6. Monitoring and review.

16. Individuals and firms that are not RCOs ought to be able to enjoy the same 'comforts' and concessions granted to RCOs. Note that "Joint Prosecution Guidance" has been issued by the Director of the Serious Fraud Office and the Director of Public Prosecutions.[8]

Impact Assessment

17. The Ministry of Justice Impact Assessment, anticipates "*reduced ongoing compliance costs for businesses and the UK authorities*" due to (it says) "*the law being clearer, simpler and quicker to understand and apply*." In fact the BA 2010 is a complex set of provisions.

18. The Impact Assessment estimates merely one contested SFO prosecution per year costing approx £2M, but with £½ million clawed back by way of civil recovery (or, presumably, criminal confiscation); and one contested CPS prosecution every three years (approx £0.3M per year), plus court costs of £0.3M per year.

Repeals

19. The common law offences of bribery and embracery are abolished.[9] Statutory offences under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, and the Prevention of Corruption Act 1916, will be repealed in their entirety.[10]

20. The Honours (Prevention of Abuses) Act 1925 is not repealed.

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8 http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/

9 See Bribery Act 2010, s.17(1).

10 See Bribery Act 2010, s.17(3), and schedule 2.

Sources of material: construing the 2010 Act

21. The Bribery Act 2010 builds on work done by the Law Commission: see Law Com No. 313 ("Reforming Bribery"); Law Commission Consultation Paper No 185 ("Reforming Bribery", 2007) and, to a lesser extent, Law Com No. 248 ("Legislating the Criminal Code: Corruption").

22. The Act was extensively debated in both Houses of Parliament when it was then a Bill.[11] However, as Lord Justice Hughes stated in *R v Y*,[12] the primary task of the Courts is not to analyse the Law Commission's report, "*but to construe the statute*". This statement holds true in relation to Parliamentary debates and academic commentaries and papers.

Stage	Date	Stage	Date
1st reading: HL	19-Nov-09	Committee Stage: 1st sitting: HC	16-Mar-10
2nd reading: HL	09-Dec-09	Committee Stage: 2nd sitting: HC	16-Mar-10
Committee: 1st sitting: HL	07-Jan-10	Committee Stage: 3rd sitting: HC	18-Mar-10
Committee: 2nd sitting: HL	13-Jan-10	Committee Stage: 4th sitting: HC	18-Mar-10
Report stage: HL	02-Feb-10	Committee Stage: 5th sitting: HC	23-Mar-10
3rd reading: HL	08-Feb-10	Report stage: HC	07-Apr-10
1st reading: HC	09-Feb-10	3rd reading: HC	07-Apr-10
2nd reading: HC	03-Mar-10	Ping Pong: HL	08-Apr-10
		Royal Assent	08-Apr-10

Brief overview of the offences

23. The BA 2010 creates *8 offences* in *three categories*:
    a. ***General Bribery offences***:
        i. Two offences by the payer: *section 1*
        ii. Four offences by the recipient: *section 2*
    b. ***Bribing a "Foreign Public Official"*** *section 6*.
    c. ***Failure of a "Relevant Commercial Organisation"*** to Prevent Bribery: *section 7*.

Offences in categories (a) and (b): Committed by Body Corporate: consent and connivance of its officers

24. Where it is proved that the offence was committed "*with the consent or connivance*[13] *of a senior officer of the body corporate, or Scottish partnership, or a person purporting to act in such*

[11] http://services.parliament.uk/bills/2009-10/briberyhl/stages.html

[12] [2008] EWCA Crim 10

[13] Quite what "connivance" means, is unclear: but see *Winson* [1969] 1 QB 371, 383, and see Smith & Hogan, 12th ed, p.119, para.5.2.7.

a capacity" then that person (as well as the body corporate, etc) is also guilty of the offence in question [s.14].

25. Note that *"[so] far as 'consent' and 'connivance' are concerned, these provisions probably effect only a slight extension of the law; for the officer who expressly consents or connives in the commission of the offence will be liable as a secondary party....There may be a consent which does not amount to counselling or abetting.*" [14]

26. Note that the bribery offences under the Act can be committed on an accessorial (secondary) liability basis (i.e. aiding and abetting, under the Accessories and Abettors Act 1861), as well as inchoately e.g., conspiracy (Criminal Law 1977), criminal attempts (Criminal Attempts Act 1981), and the broadly drawn offences of assisting and encouraging crime under Part 2 of the Serious Crime Act 2007.[15]

Offences in categories (a) and (b): Extraterritorial Effect

27. The first three offences have extraterritorial effect by virtue of s.12 of the 2010 Act.

28. The UK courts will have jurisdiction under s.12(1), "*if **any** act or omission which forms part of the offence takes place in that part of the United Kingdom*". For example, if P sends a fax from the UK, to R who is in France, and offers the latter a bribe, P has performed an act in the UK which is caught by s.12(1) notwithstanding that R might not read the fax until much later.[16]

29. The UK courts will also have jurisdiction in cases where:
    a. The defendant has a "close connection with the United Kingdom" (e.g., a British citizen or other person specified in s.12(4)(a)-(i)) *and*
    b. The defendant performs abroad one of the acts specified in ss.1, 2, or 6. That act is treated as if it had been carried out in the UK and the offence is triable in the UK.[17]

Offences in categories (a) and (b): Penalties

30. Individuals: on *summary trial*, the maximum penalties are 12 months' imprisonment, a fine not exceeding the statutory maximum, or both [s.11(1)(a)]. Following trial

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14 Smith and Hogan, *Criminal Law*, p.254; Professor David Ormeord.

15 See R. Fortson "*The Serious Crime Act 2007*", Blackstone's Guide, OUP; D. Ormerod and R. Fortson "*Serious Crime Act 2007: The Part 2 Offences*" [2009] Crim.L.R. 389; and M. Bohlander "*The Conflict between the Serious Crime Act 2007 and section 1(4)(b) of the Criminal Attempts Act 1981: a Missed Repeal?*" [2010] Crim.L.R. 483.

16 It might be said that for the purposes of s.1, BA 2010, the making of an offer (whether successfully communicated or not) is an offence contrary to that section if P has the requisite *mens rea*.

17 This is the combined effect of s.12(2)-(4) of the Bribery Act 2010.

on *indictment*, the maximum penalties are 10 years' imprisonment, an unlimited fine, or both: [s.11(1)(b)].

31. Legal entities: the penalty is a fine (unlimited on indictment, or not exceeding the statutory maximum if tried summarily): s.11(2).

Consent to prosecution

32. No prosecution may be instituted in England and Wales without the consent of the DPP, Director of the SFO, or the Director of Revenue and Customs Prosecutions.

33. In Northern Ireland, the consent of the DPP for Northern Ireland, or the Director of the SFO, is required: s.10.

34. The upshot is that the relevant Directors are given considerable discretion regarding the appropriate response to breaches of the BA 2010 (e.g. whether to prosecute, seek civil recovery, or take no action). The question of whether laws that are broadly drawn, instil fear, lack certainty as to their actual reach, and which depend on discretion being exercised by law enforcement agencies to keep responses proportionate, is beyond the scope of this handout but warrant consideration.

Words and Phrases

"Bribe": what is a bribe for the purposes of the Act?

35. The BA does not provide a single definition of "bribe" or "bribery" to be applied consistently across the Act.

36. Despite the appearance of the word "bribe" in each of the headings to sections 1 to 4 (inclusive), the word "bribe" does not appear in the body of the section, and it not defined.

37. However, for the purposes of section 6 (bribery of foreign public officials) the notion of a "bribe" is described in s.6(3). Similarly, for the purposes of section 7 (failure of commercial organisations to prevent bribery), the word "bribe" is described in s.7(3). BUT, the two descriptions of what a bribe is, differs.

38. The following points should be noted:
    a. A bribe, for the purposes of the BA 2010, does not involve a single set of circumstances but several.

b. Nothing is gained by attempting to distil the essence of what the 2010 Act means by a "bribe".

c. We are driven to consider the notion of a 'bribe' in the context of the offence in question.

d. The BA 2010 occasionally use the words 'bribe' and 'bribery' somewhat loosely (e.g. in subheadings) and includes 'rewards' for the performance of functions and activities that have been carried out notwithstanding that the performance had not been induced by P.

e. There is no longer any need to look for a principal-agent relationship. The bases of culpability are now more widely drawn.

39. One element of a 'bribe' always exists, namely, the element of "a financial or other advantage" [see s.1(2), s.1(3), s.2(1)-(5), s.6(3)(a), s.7(3)[18]]. By itself, this element would not be conclusive of a corrupt or improper practice.

40. The BA 2010 does not define the expression "a financial or other advantage". Little or no purpose is served by drawing upon definitions in earlier legislation.[19] The Explanatory Notes merely say that "*The meaning of "financial or other advantage" is left to be determined as a matter of common sense by the tribunal of fact*" (para.15).

41. None of the offences is expressed to have the element of dishonesty.[20]

42. Whether conduct constitutes a 'bribe' largely depends on:

a. The mental element that must be proved in the context of the offence charged under the 2010 Act.

b. Whether there has been "improper performance" to which the 'advantage' relates (impropriety is judged by the standards of what reasonable people in the UK "would expect").

43. Note that the fault requirements differ markedly in respect of each of the four offences created under the Act.[21]

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18 The Bribery Act 2010, s.7(3)(a), takes us back to section 1 or 6.

19 Section 7 of the Public Bodies Corrupt Practices Act 1889 defined "advantage" as, "....any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined." see Law Com.313, para.2.10.

20 There is some uncertainty whether the Acts of 1889 and 1906 require "dishonesty": see Law Com.313, para.2.33, and 3.111,

21 It is submitted that in relation to the fourth offence (s.7, commercial organisation failing to prevent bribery) there is a *mens rea* trap for the unwary. Under s.7(1), "A" – who bribes - must intend to obtain or retain one of the things mentioned in s.7(1)(a) or (b). But A must also have the *mens rea* necessary for an offence under ss.1 or 6 [see s.7(3)(a)], noting s.7(3)(b).

44. Whether conduct constitutes a bribe also depends on what the underlying purpose/aim is when carrying out that conduct. Thus, the aim in s.1 and s.2 is the "improper performance of a relevant function or activity". The improper aim in s.6 and s.7 is the obtaining or retaining of business or an advantage in the conduct of business.

"Relevant function or activity"

45. A "relevant function or activity" is defined by s.3 of the 2010 Act. There are two important component parts to that expression that MUST be considered in every case.

    i. The functions and activities are those of a public or commercial nature [see s.3(2)]:[22]
        (a) any function of a public nature,
        (b) any activity connected with a business,
        (c) any activity performed in the course of a person's employment,
        (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).

    ii. Where there is an "*expectation*"[23] that those functions/activities will be performed:[24]
        (a) in "good faith" ["condition A", s.3(3)], or
        (b) "impartially" ["condition B", s.3(4)], or
        (c) "in a position of trust" ["condition C", s.3(5)].[25]

    It is immaterial *where* the function or activity is carried out [s.3(6)].

46. The expression "relevant function or activity" is *directly* relevant to the first two offences of bribery under ss.1 and 2. It is *indirectly* relevant to the fourth offence (commercial organisation failing to prevent bribery) [see s.7(3)(a)]. But the expression is not employed in relation to the third offence (s. 6, bribing foreign public officials).

"What is expected": the problem that Parliament had to analyse

47. Although the payment of tips to hotel staff, taxi drivers, or baggage attendant would not be regarded as bribes, the payment of a gratuity to a planning officer might be.

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22 "Business" includes "trade or profession": Bribery Act 2010, s.3(7).

23 The test "of what is expected", appears in s.5 of the 2010 Act.

24 See Law Com.313, para.3.136.

25 The Law Commission did not wish to see the word "trust" being narrowly construed: see Law Com.313, para.3.157.

48. Accordingly:

- What makes one act acceptable but not another?
- When does corporate hospitality cease to be acceptable (i.e. not "what is expected") and cross over into bribery that is punishable under the BA 2010?
- Should the law criminalise acts performed abroad that are morally acceptable there but which are viewed as reprehensible by the standards of persons living in the UK?

The Law Commission did not find this topic easy to resolve.[26]

49. The 2010 Act does not speak of "corruption" or "corrupt payments". Instead, the general bribery offences under ss.1 and 2, speak of the "*improper* performance" of a relevant function or activity, in terms of "what is expected" by a reasonable person in the UK.[27]

50. It should also be noted that the BA 2010, unlike its forerunners, draws no distinction between conduct within the public and private sector:[28]

> "....the focus is instead on whether D abused his or her position, in connection with an advantage offered, given or accepted, by failing to come up to an expectation about how his or her function would be performed."[29]

51. The absence of a distinction between the standard that reasonable people expect from persons who hold positions within the *public sector* (on the one hand) and the *private sector* (on the other) has been defended by Professor Jeremy Horder[30] but powerfully criticised by Professor Peter Alldridge for whom there exists a 'core' group of persons in respect of whom society expects higher standards (e.g. judges):[31]

> There may well be advantages in labelling that "core" group separately and imposing higher standards upon it. The first is that it need not be necessary to think about the meaning of *mens rea* terms like "corruptly", "improperly" and so on,[32] when dealing with that limited category, certainly not in the precise and

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26 Consider Law Com. No.248, paras. 5.75 to 5.82 (*Legislating the Criminal Code: Corruption*); Law Com 185, see Appendix F, paras F.59 to F.113; and Law Com No. 313, paras, 3.67 to 3.70, and D.13 to D.18; and see G.R. Sullivan, " *Proscribing Corruption-some comments on the Law Commission Report*" [1998] Crim. L.R 547. See also see G.R. Sullivan "*The Bribery Act 2010: (1) An Overview*" [2011] Crim LR.87, p.89.

27 In this connection, see G.R. Sullivan "*The Bribery Act 2010: (1) An Overview*" [2011] Crim LR.87.

28 J. Horder "*Bribery as a form of criminal wrongdoing*" LQR, 2011, p.37.

29 As Professor Horder points out, "This requirement is common to all three of the fraud offences currently under discussion, namely the offences in ss.2, 3 and 4 of the 2006 Act" [fn.24]

30 J. Horder "*Bribery as a form of criminal wrongdoing*" LQR, 2011, p.

31 P. Alldridge: "*Reforming Bribery: Law Commission Consultation Paper 185 (1) Bribery Reform and the Law Commission – Again*" [2008] Crim.L.R. 671.

32 Professor Alldridge makes the point that "There is no 'corruptly' requirement, for example, in the Honours (Prevention of Abuses) Act 1925".

> detailed way that the Commission has in respect of commercial bribery. If it is corrupt *per se* for a judge to receive a present, then no further *mens rea* terms need be added or defined. Secondly, in terms of gradation of offences, these are generally more serious cases. It is, in general, more serious to bribe someone involved in the administration of justice than to bribe someone to secure a contract. The former involves an attack upon the rule of law, which is a precondition to any other rules, whether of criminal law or otherwise. If a judge or a prosecutor can be bribed, then it does not matter what the rules are because they do not apply to the briber.

52. Consider three examples (is the standard in each case below 'what is expected', or not?):
    a. A judge receives Christmas gifts from litigants in the case that he/she is then hearing.
    b. A Head Teacher receives "tokens of appreciation" from the parents of the pupils at his/her school.
    c. A local food producer gives an Easter hamper to the manager of the local supermarket.

"What is expected": the approach enacted in the BA 2010

53. Section 5(1) enacts a statutory 'expectation test', namely, "*what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned*" [s.5(1)].

54. Although s.5(1) does not spell it out, we are taken back to s.4(2) [which sets out the relevant functions] and s.3(3) [conditions A to C].

55. Thus, the expectations, in relation to a "function or activity", are three in number:
    i. Good faith (condition A)
    ii. Impartiality (condition B)
    iii. Trust (condition C)

56. For example:
    (a) A reasonable person in the UK would expect a judge to be impartial, but not (arguably) a hard-nose entrepreneur.
    (b) A reasonable person would expect a banking official to display trust;
    (c) A reasonable person would expect a police officer to act in good faith and he/she occupies a position of trust.

57. Accordingly, Parliament appears to have recognised that there is a 'core' group of persons in respect of whom higher standards are expected of them.

58. Note that some offences are stricter than others. Thus, for the purposes of Case 4 (s.2(3)) the request, agreement or acceptance of an 'advantage' *itself* constitutes "improper performance" by the defendant and it is not necessary to prove that the defendant knew or believed his conduct to be improper (s.2(7)).

59. The effect of s.2(7), in relation to Cases 4 to 6, is to create offences of strict liability in all but name.

60. Note the following additional points:

    a. The words "what is expected" connote a normative standard. Precisely what that standard is will ultimately be a matter for the jury to say.

    b. Section 5(1) requires fact-finders to judge the alleged offending conduct by the standard expected of persons who act similarly in the UK and not on the basis of what is tolerated elsewhere.

    c. Section 5(2) states that any local custom or practice is to be disregarded *unless* it is permitted by a "written law" embodied in the written constitution or laws (including judicial decisions) of the foreign state [see s.5(3)]. This is an imperfect rule because many practices and customs are not written into law. For example, the UK practices of 'tipping' waiters and taxi drivers, or showing corporate hospitality, are not written into English law.[33]

61. The upshot of the above is that the test of "what is expected...by a reasonable person in the UK" is an objective test. A defendant cannot therefore be heard to say that the recipient (R) was so corrupt that there was no expectation that R would act in good faith, or impartially, and nobody would trust him.[34]

62. Note that whether, for the purposes of some offences, it is open to a defendant to deny that he lacked *mens rea* because he did not consider conduct to be "improper", is a discrete topic (considered below).

63. The third offence (foreign public officials, s.6) is differently constructed and here the test is whether the recipient of the financial advantage etc, is permitted by "written law" to be influenced by the offer, promise, or gift.

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[33] Professor Sullivan states that "One thinks immediately of jurisdictions where it is obligatory to appoint commercial agents and pay them large commissions based on the gross value of the contract even in the case of what would be regarded as public sector contracts in the United Kingdom" adding (fn 18) that "The Al Yamamah contracts set the gold standard in respect of commission payments to commercial agents": see G.R. Sullivan "*The Bribery Act 2010: (1) An Overview*" [2011] Crim LR.87, p.91.

[34] My thanks to Professor David Ormerod for drawing my attention to this conceivable line or argument.

"Improper performance"

64. A "relevant function or activity" is improperly performed if it is not performed in good faith, or performed impartially [see s.4(1)(a), (2)(a)], or constitutes a breach of trust [see s.4(1)(a), (2)(b)]. Where a person has left an occupation (e.g. a government minister) his/her "past performance" (e.g. as a minister) will be treated under the BA 2010 as being done in performance of any function or activity associated with that occupation [s.4(3)].

> *Example 3B*[35]
> R has recently retired from an influential position in the civil service. He or she is approached by P who is seeking a lucrative contract with a Government department. P pays R a large sum of money to provide confidential information to P about the bidding processes.

Analysing whether a "general bribery offence" has been committed, or might be committed.

65. Although it is tempting to focus on the conduct of the person offering or giving the 'advantage', it is submitted that the best approach is (initially) to focus on the conduct of the intended or actual *recipient*. This is because it is the recipient who performs the "relevant function or activity" (e.g. issuing permits) that may, or may not, be judged "improper" applying the "reasonable person - expectation" test under ss.4 and 5 of the Act.

66. IF the recipient is the accused, then his/her guilt or innocence may turn on whether any fault element necessary for the commission of the offence in question, is proved. However, it will be seen that, in relation to recipients, Cases 4-6 [i.e. s.2(3), (4), and (5)] are offences of strict liability.

67. IF the accused is the person who makes the offer or gives an 'advantage', then his/her guilt may turn on the fault element required to be proved under s.1(2)(b) or s.1(3)(b) of the Act.

Offence of bribing another person: section 1

68. Section 1 specifies two sets of circumstances ("case 1" and "case 2") in which a person ("P") commits an offence of bribing another person.

Case 1:

69. Case 1, has different elements depending on whether the facts fall within s.1(2)(b)(i) or (ii). The essential difference is in respect of cases where the

[35] Law Com. No. 313: para.3.26.

"relevant function or activity" has *not* been performed (but P intended to induce its improper performance), and cases where the function/activity *has* been improperly performed (and P's purpose is to reward that performance). These two cases are considered separately, below.

70. *Function/activity not performed*: s.1(2)(a), (b)(i)

- The *actus reus* of the offence for the purposes of s.1(2)(a) *and* (b)(i) is that P offers, promises, or gives a financial or other advantage to another [s.1(2)(a)]:

  Note: It is immaterial that the other is not the same person who is to perform the function or activity concerned. [s.1(4)]

- The *mens rea* of the offence is:
  a. that P intends (i.e. it is his purpose) that the financial or other advantage will induce another person to perform a relevant function or activity[36], *and* (it is submitted)
  b. that P intends that its performance should be improper[37] [s.1(2)(b))(i)]. It is submitted that it is not necessary to prove that P succeeded in inducing a person to behave in the forbidden way. P can be judged on the basis of what he intended.

71. *Function/activity has been improperly performed*: s.1(2)(a), (b)(ii)

- The *actus reus* of the offence is that P offers, promises, or gives a financial or other advantage to another [s.1(2)(a)]. It is immaterial that the 'other' person is not the same person who has performed, the function or activity concerned [s.1(4)].
- The *mens rea* is that P intended to reward a person for having performed the relevant function, *and* (it is submitted) that P knew that its performance was improper [s.1(2)(b))(ii)].[38]

  Note that there may be cases where P *intended* to reward another in the mistaken *belief* that a function/activity had been carried out when in fact it had not been. It is submitted that this situation is not caught by s.1(2)(b)(ii). The offence is not framed in terms of offering/giving a reward *in the belief* that there had been an improper performance.

72. In relation to the *mens rea* element, the question of whether P is to be acquitted if he did not believe that the conduct that he was inducing or rewarding was

[36] See Bribery Act 2010, s.3
[37] See Bribery Act 2010, s.4, and see Law Com.313, para.3.5.
[38] Law Com. No. 313: para.3.6.

"improper" is not addressed in the BA 2010.[39] One solution (arguably) is to adopt the approach taken by the Courts where dishonesty is the issue.[40] Thus the test would be whether the defendant himself must have realised that what was done or going to be done was, by the standards of reasonable people, improper.

73. The following additional points are made:
    a. Expressions such as "induce" and "reward" are likely to be given an everyday meaning.
    b. A "reward" may take many forms, e.g. payment in cash or in kind (e.g. expensive holidays; gifts of excessive value or given in breach of a contract of employment). It is not clear how valuable the thing must be to constitute a "reward": see *Bodmin Case* (1869).[41]
    c. It is submitted that it is sufficient that an "offer" is made; it need not be communicated. Arguably, the latter is unlikely to arise in practice given that bribery is typically a covert activity. However, some offers are disguised as pledges by way of 'loan' agreements which, in truth, are shams.
    d. The performance of a function/activity will be "improper" (or would be) if the normative standard of that performance falls short of what a reasonable person in the UK "would expect" [s.5] – that is to say, that the conduct is not done in good faith, or impartially, or constitutes a breach of trust [s.4].

Case 2

74. The *actus reus* of the offence is that P offers, promises, or gives a financial or other advantage to another [s.1(3)(a)]. It is immaterial whether the advantage is offered, promised or given, by P directly or through an intermediary: see s.1(5).

75. The *mens rea* is that P knows or believes that the mere acceptance of the advantage would *itself* constitute the improper performance of a relevant function or activity [s.1(3)(b)].

76. The performance will (or would) be "improper" if the acceptance of the offer, promise, or receipt, of a financial or other advantage, is not what a reasonable person in the UK "would expect" [s.5] (i.e. not done in good faith, or impartially, or constitutes a breach of trust [s.4]). But, more importantly, P must know or believe that to be the case and, if proved, his awareness will be sufficient to convict him.

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39 See G.R. Sullivan "*The Bribery Act 2010: (1) An Overview*" [2011] Crim LR.87, p.93.

40 *Ghosh* [1982] QB 1053

41 (1869) 1 O'M & H 121. Willes J mentioned how he had been required to swear that he would not take any gift from a man who had a plea pending unless it was "meat or drink, and that of small value": see Law Com.313, para.2.5, fn.4.

77. It is submitted that "knows" and "believes" are not synonymous. There may be cases where P is fully conversant with rules pertaining to R's performance of a function.

78. There may be other cases where P mistakenly believes that the person he is seeking to influence is required to act in a particular way when he is not.[42] In each case, P is to be judged on the facts as he knew or believed them to be.

Being bribed: section 2

79. This offence concerns the person who has received a 'bribe'. Note:
    a. The offence may be committed in one of four ways (i.e. Cases 3 to 6).
    b. Section 4(3) may apply: see para.59 of this handout.
    c. The offences are not confined to principal-agent disloyalty.[43]

Case 3

80. The *actus reus* is that R requests, agrees to receive, or accepts, a "financial or other financial advantage". Those actions may be done directly by R or through a third party [s.2(6)(a)]. The advantage may be for the personal benefit of R or another person [s.2(6)(b)].

81. The *mens rea*, is that R intends that, in consequence of the 'advantage', a "relevant function or activity" [see s.3] should be performed improperly [see ss. 4 and 5, described above[44]]. It is submitted that by "intends" is meant that it is R's *purpose* that the relevant function or activity should be performed.[45]

82. The question may arise whether R must intend that the function should be performed *improperly*. It is submitted that the answer is in the affirmative not least by virtue of s.2(7) which expressly applies to Cases 4 to 6, but not to Case 3.[46]

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42 Consider an example given by the Law Commission: "Suppose R must by law issue P with a licence. Even so, P gives R £500 to issue the licence (for example, to rest assured in his or her own mind that R will issue the licence). In such a case, P will be guilty of bribery under our scheme if P knew or believed that it would be improper for R to accept the £500." Law Com No. 313, para.3.76.

43 See Law Com.313, para.3.181.

44 As stated elsewhere in this document, the performance will (or would) be "improper" if the function or activity is not performed in accordance with what a reasonable person in the UK "would expect" [s.5] in that the conduct is not done in good faith, or impartially, or constitutes a breach of trust [s.4]

45 It is further submitted that it is unnecessary to qualify "intends" by including a consequence that R foresees would be 'virtually certain' to occur. It is arguable that this principle has a place in other areas of the criminal law, but the principle is not without its critics.

46 Note the discussion in the article by Professor Sullivan: G.R. Sullivan "*The Bribery Act 2010: (1) An Overview*" [2011] Crim LR.87, pp.91-94.

83. It is submitted that it is not necessary that R's "request" need in fact be communicated to P. The offence is complete once the request is made with the requisite *mens rea*.

Case 4

84. Case 4 requires little more than that:
    a. R requests, agrees to receive, or accepts, a financial or other advantage, and
    b. the request, agreement or acceptance *itself* constitutes the improper performance by R of a relevant function or activity [s.2(3)]. For example, a police officer who requests the payment of a fee for recording a crime.

85. The above actions may be done directly by R or through a third party [s.2(6)(a)]. The 'advantage' may be for the personal benefit of R or another person [s.2(6)(b)].

86. It is immaterial that R neither knew, nor believed that his own conduct (e.g.) in making the request, or accepting a gift, was "improper".[47] The offence appears to be one of strict liability.

Case 5

87. At the heart of Case 5 is the "improper performance" of a "relevant function or activity" by R, or by someone else [s.3(4)]. When this has occurred, R will commit an offence if he/she requests, agrees to receive, or accepts, a financial or other advantage as a reward.

88. It is immaterial whether R makes the request etc, either directly or through a third party [s.2(6)(a)]. The advantage may be for the personal benefit of R or another person [s.2(6)(b)].

89. It is immaterial that R neither knew, nor believed that performance of the relevant function or activity was "improper".[48]

Case 6

90. The drafting of this provision is untidy. However, it appears to be directed at cases where a "relevant function or activity" is carried out in the hope (or anticipating) that a reward, or offer of a financial (or other) advantage, would be forthcoming [s.2(5)].

[47] See s.2(7) of the Bribery Act 2010, and ss.4 and 5 of the Act for the meaning of "improper", and "what is expected".

[48] See s.2(7) of the Bribery Act 2010, and ss.4 and 5 of the Act for the meaning of "improper", and "what is expected".

91. Thus, s.2(5) refers to situations, namely, where:
    a. R *anticipates* a financial or other advantage, or
    b. R has *made a request* for such an advantage (and the function is carried out in the expectation that the request will produce a benefit), or
    c. R *agrees to receive* a benefit and the function is carried out in the expectation that a benefit will accrue.

92. An oddity in the drafting of this provision is the inclusion of the words "*accepting a financial advantage*" because that would arguably fall within Case 5.

93. It is immaterial that R neither knew, nor believed that performance of the relevant function or activity was "improper".[49]

94. It is immaterial whether R makes the request etc, either directly or through a third party [s.2(6)(a)]. The advantage may be for the personal benefit of R or another person [s.2(6)(b)].

Bribing Foreign Public Officials: section 6[50]

95. The 2010 Act defines a "foreign public official" [51] as an individual in a place out of the UK who holds a legislative, administrative, or judicial position of any kind, or who exercises a public function for a non-UK country, public agency, or public enterprise, or who is an official or agent of a "public international organisation"[52]. The *actus reus* of the offence is made up of several elements.

96. In short, P must "bribe" F:
    i. P (directly or through a third party), offers, promises or gives any financial or other advantage to F (or to another person at F's request or with F's assent or acquiescence): see s.6(3)(a); *and*
    ii. The "written law"[53] did not permit or require F (in his capacity as a foreign public official) to be influenced by the offer, promise or gift: s.6(3)(b).

97. The *mens rea* is:
    i. That P intends to "influence" F in the "performance of F's functions as a foreign public official"[54] [s.6(1), (4)]; *and*

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49 See s.2(7) of the Bribery Act 2010, and ss.4 and 5 of the Act for the meaning of "improper", and "what is expected".

50 See Law Com.313, Part 5, esp. Paras.5.61 to 5.71.

51 See the Bribery Act 2010, s.6(5).

52 Defined by s.6(6), Bribery Act 2010.

53 Typically this is the written law of the foreign state, but it could be UK law if performance by F would be subject to the law of the UK: see Bribery Act 2010, s.6(7).

ii. That P intends to "obtain or retain" business or an advantage in the conduct of business [s.6(2)].

98. It is submitted that by "intends" is meant that it is P's *purpose* to act as alleged. It is debatable whether this includes virtually certain consequences.[55] The Law Commission has described this offence as being "*defined in the inchoate mode*".[56]

99. Note that s.6 does not employ the expression "relevant function or activity". Its absence from s.6 is presumably deliberate. The effect would seem to be that the three Conditions (A-C) in s.3 (good faith, impartiality, trust) are not applicable. This suggests that it is sufficient for the purposes of s.6, that P has "bribed" F (within the meaning of s.6(3)) with the requisite *mens rea* specified in that section.

100. P may be regarded as having bribed a foreign public official to carry out a function even if it was not within the official's authority/power to do so. For example, F may falsely claim to P, that F has authority grant a permit or licence when in fact F has no such authority. However, this will not save P: see s.6(4)(b).[57]

101. In a helpful article, Charlie Monteith, suggests that the "wrongdoing" in respect of which s.6 is directed is "*in intending to influence a foreign public official through or by what is given or offered or promised*":[58]

> It is not an offence (or potential offence), as many have suggested, to provide a FPO with a meal (or other benefit) unless the provider intends through the provision of the meal (or other benefit) to influence the FPO in his or her official capacity. Thus, if what is provided is reasonable, proportionate and done in good faith, it is difficult to see how the offence can be triggered. Some have suggested putting monetary limits on hospitality and expenses. I would prefer to see suggested acceptable standards of provision (rather than values) along the lines of "we will provide a hotel or restaurant to a 3 or 4 star standard". The same is true of travelling and related expenses. Values or monetary limits will vary around the world, whereas agreed standards of provision should remain universal. Paying a fee to a FPO is a more difficult area. Ideally, wherever possible, this should be avoided.

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54 Somewhat confusingly, s.6(4) also uses the expression "F's capacity as a foreign public official".

55 Consider Law Com.313, para.3.67 to 3.70.

56 See Law Com.313, para.5.115.

57 For a further discussion of corporate obligations under ss.6 and 7 of the 2010 Act, see S. Gentle "*The Bribery Act 2010: (2) The Corporate Offence*" [2011] Crim LR 101.

58 "*The Bribery Act 2010: (3) Enforcement*" [2011] Crim. L.R 111

Failure of commercial organisation to prevent bribery: section 7 [59]

Short description of the offence

102. In cases where there has been bribery – as defined by s.7(3) - by (e.g.) a servant, or agent, or subcontractor,[60] which was intended to be to the organisation's advantage, then the latter commits an offence contrary to s.7 of the BA 2010 *if* the organisation did not have in place adequate procedures designed to prevent bribery [see s.7(2)]. Precisely what s.7 *actually* requires, in terms of the elements of the offence, depends on whether the due diligence defence under s.7(2) gives rise to an evidential burden,[61] or a legal burden,[62] of proof.

The minimum number of elements that the prosecution must prove

103. It is submitted that *the least* that the prosecution must prove is:
    i. That a person ("A") bribed another (s.1 offence), or bribed a foreign public official [s.6]. It is immaterial whether the bribery occurred in the UK or wholly abroad [this is the effect of s.7(3)(b)].
    ii. That "A" must have acted with the *mens rea* for the offence in question [see s.7(3)(a)].
    iii. That "A" intended to obtain or retain business, or an advantage in the conduct of the business, for the organisation ("C"): s.7(1)(a), (b);
    iv. That "A" is associated with "C": s.7(1), (5). This may be a person who acts for or on behalf of C, or is C's employee, agent, or subsidiary: s.8.[63]

The statutory defence (due-diligence):[64] evidential burden or legal burden?

104. It is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from bribing others: see s.7(2). If the defence imposes a legal burden then C must prove it on a balance of probabilities. However, if C shoulders only an evidential burden then once the issue is raised, the burden will be on the prosecution to prove that C did not have adequate procedures in place.

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59 Described by Professor Sullivan as breaking new ground "both in terms of of the conduct made criminal and in the extent of its jurisdictional reach": G.R. Sullivan "*The Bribery Act 2010: (1) An Overview*" [2011] Crim LR.87.

60 That is to say, an "associated person", see s.8, Bribery Act 2010,

61 That is to say, whether the organisation need only "raise the issue" so that, once raised, it will be for the prosecution to prove to the criminal standard of proof that the organisation did not have adequate procedures in place.

62 That is to say, that the organisation has the burden of proving *to the civil standard* that it *did* have adequate procedures in place.

63 This would surely include subsidiaries to a parent company; and see G.R. Sullivan "*The Bribery Act 2010: (1) An Overview*" [2011] Crim LR.87, p.98,

64 See Law Com.313, para. 6.52-6.125.

105. Determining who shoulders the incidence and standard of proof, for the purposes of s.7, is not straightforward. It might be said that the organisation is best placed to know and to testify to the procedures it had put in place (and when) in order to prevent bribery: consider s. 3 of the Human Rights Act 1998, Article 6.2 of the ECHR, *Salabiaku v France*,[65] *Lambert*;[66] *Johnstone*;[67] and *Sheldrake and Others*;[68] and more recently, in the context of s. 2 Prevention of Corruption Act 1916, see *R v Webster (Matthew)*[69]).

Relevance of Guidance Published under s.9

106. The Guidance of the Secretary of State regarding procedures that are relevant to prevent persons associated with a commercial organisation from committing acts of bribery [see s.9], is likely to be highly relevant when the Court - and law enforcement agencies - are considering whether there has been a breach of s.7.

Jurisdiction

107. It is important to note that, for the purposes of this offence, the "commercial organisation" must have a connection with the UK described in s.7(5). Typically, the connection is that the entity was formed or incorporated in the UK regardless of where it carries out its commercial operations. In the case of some partnerships, and some 'body(ies) corporate', it is sufficient that they carry on part of their business in the UK, even if those businesses were formed or incorporated out of that jurisdiction.

108. The extra-territorial reach of the fourth offence could not be rendered any wider than it is. Section 12(5) and (6) provide that the offence is committed irrespective of where the act or omission occurred,[70] and proceedings for an offence may be taken in any part of the UK.[71]

Accessorial liability

109. There is force in the observations of Professor G. R. Sullivan that the BA 2010 does not insulate persons employed by or associated with the organisation from

65 [1988] 13 EHRR 379
66 [2001] UKHL 37, [2002] 2 AC 545
67 [2003] UKHL 28, [2003] 1 WLR 1736
68 [2004] UKHL 43
69 [2010] EWCA Crim 2819
70 Bribery Act 2010, s.12(5).
71 Bribery Act 2010, s.12(6).

secondary liability for the commission of an offence under s.7 by the organisation.[72]

Penalties

110. The offence appears to be triable only on indictment: this is because s.11(3), BA 2010 provides one penalty, namely, a fine if convicted on indictment.

Limited defence where conduct is a "proper exercise" of a function

111. Section 13 of the 2010 Act provides a defence, of limited scope, to a "relevant bribery offence"[73] if the accused proves that his/her conduct was "*necessary for the (a) the proper exercise of any function of an intelligence service, or (b) the proper exercise of any function of the armed forces when engaged on active service.*" [s.13(1)]. The heads of each intelligence service, and the Defence Council (for the armed forces), must have arrangements in place to ensure that the commission of what would be a "relevant bribery offence", is necessary.

112. The Courts may be required to decide whether the accused shoulders the legal/persuasive burden of proof, or the evidential burden. It is tentatively submitted that the answer is likely to be the former as the defendant will be best placed to know (a) the extent of any arrangements that were in place to ensure that the conduct complained of was necessary, and (b) that the conduct was in fact necessary.

113. It will be noted that there appears to be no saving for a UK business that claims that it had acted in the national interest.

Reasons for enacting the Bribery Act

114. The view of the UK government (at least in 2009) was that legislation was needed to strengthen the government's work with international partners; and that UK law as it then existed was complicated and fragmented,[74] and which "*has been criticised domestically and internationally for its lack of clarity and inconsistencies in the terminology used*",[75] and which took "*no account of twentieth-century developments in business regulation*

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72 See G.R. Sullivan "*The Bribery Act 2010: (1) An Overview*" [2011] Crim LR.87, p.95.

73 **(a)** an offence under s.1 which would not also be an offence under s.6; **(b)** an offence under s.2; **(c)** an offence committed by aiding, abetting, counselling or procuring the commission of an offence falling within paragraph (a) or (b); **(d)** an offence of attempting or conspiring to commit, or of inciting the commission of, an offence falling within paragraph (a) or (b), or **(e)** an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) in relation to an offence falling within paragraph (a) or (b).

74 See Law Com.313, para. 2.24.

75 Regarding the suggestion of "inconsistency", see Law Com.313, para. 2.27.

and giving no legal recognition for good-faith efforts to avoid improper payments."[76] The Impact Assessment cited an estimate of the World Bank that bribery added 10% to the total cost "of doing business globally".[77]

115. Part of the (then) government's thinking seems to have been that modified rules relating to bribery and corruption had the support of the majority of persons within the business community, citing a study by Price Waterhouse Coopers that revealed that 65% of businesses "*believed a level playing field is critical to their future operations. More than 70 per cent of businesses believed a better understanding of corruption would allow them to compete more effectively, make better decisions, improve corporate social responsibility and enter new markets.*[7]78"[79] The study may represent the ideals held by the business community but the business community also has to be pragmatic. The World Bank estimated that "*15% of all companies in industrialised countries have to pay bribes to win or retain business. In Asia this figure is at 30% percent. In the countries of the former Soviet Union 60% of all companies must pay bribes to do business.*[9] *Globally, this results in the payment of more than £1000 billion ($1 trillion) in bribes each year.*"[80]

116. The question arises whether the Bribery Act 2010 gives the business community the "level playing field" that it seeks. The answer that appears in the Impact Assessment is that the government is committed to taking multilateral action to tackle bribery and corruption, "*making the UK a hostile environment for those seeking to hide the proceeds of corruption*".[81] However, the reality is that the UK is not the only jurisdiction where proceeds of corruption can be concealed and laundered.

117. The Impact Assessment recognised that UK businesses might bear losses stemming from the new law but had "*no evidence relating to the likely size of these losses*".[82] The government thought that businesses might gain from new corruption laws but accepted that it was not possible to quantify that benefit.[83]

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76 Impact Assessment, p.5.

77 Impact Assessment, p.6.

78 Footnote 7 cites: http://www.pwc.com/en_TH/th/publications/assets/confronting_corruption_printers.pdf

79 Impact Assessment, p.7.

80 Impact Assessment, p.7. Footnote [9] cites, Transparency International UK, Corruption Data http://www.transparency.org.uk/corruption-data.

81 Impact Assessment, p.8.

82 Impact Assessment, p.12.

83 Impact Assessment, p.14.

Summary of bribery and corruption offences pre the 2010 Act

Bribery at common law

118. It is an offence, triable only on indictment, for a person to bribe the holder of a public office, or for any such office holder to accept such a bribe: *R v Whitaker*;[84] *R v Lancaster*;[85] *R. v. Young*;[86] *R. v. Gurney*;[87] *R. v. Harrison*;[88] *R. v. Vaughan*.[89]

119. Sentence is at large.

120. The offence is prospectively repealed by s.17(1) of the Bribery Act 2010.

Corruption in public office

121. Section 1 of the Public Bodies Corrupt Practices Act 1889, provides;

> (1) Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage[90] whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of [an offence].
>
> (2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of [an offence].

122. It will be seen that s.1 caters for two situations; the first is where D is the recipient or intended recipient of a bribe [s.1(1), PBCPA 1889]; the second is where D gives, promises to give, or offers a bribe [s.1(2), PBCPA 1889].

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84 [1914] 3 KB 1283

85 (1890) 16 Cox CC 737

86 (1801) 2 East 14 at16

87 (1867) 10 Cox 550

88 (1800) 1 East P.C. 382

89 (1769) 4 Burr. 2494. See *Archbold Criminal Pleading, Evidence and Practice 2011*; chp.31-138

90 Note that the expression 'advantage' includes any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined: *Public Bodies Corrupt Practices Act 1889, s. 7*.

123. The offences under s.1 of the 1989 Act are broadly drawn but they turn on whether the conduct is "corrupt".

124. By s.2 of the Prevention of Corruption Act 1916, there is a presumption of corruption (which is confined to employees and not (e.g.) councillors):

> Where in any proceedings against a person for an offence under the Prevention of Corruption Act 1906, or the Public Bodies Corrupt Practices Act 1889, it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of His Majesty or any government department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from His Majesty or any government department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.

125. The presumption is limited in scope as it is relates to the holding of, or seeking to obtain, a contract (and not, for example, the granting of planning permission; consider *Dickinson*[91]). It is now clear that the burden on the defendant is evidential only: *R v Webster*.[92]

126. The expression "public body" [93] (see s.7 of the 1889 Act,[94] and ss.2 and 4(2) of the 1916 Act) is not restricted to local authorities but refers to any body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit:.[95] However, s.2 of the 1916 Act distinguishes between the Crown or any government department (on the one hand) and "a public body" (on the other hand).

127. These offences are prospectively repealed by s.17(3) and schedule 2 of the Bribery Act 2010.

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91 (1948) 33 Cr App R 5

92 [2010] EWCA Crim 2819. The editors of *Blackstone's Criminal Practice* (2011) have suggested that the problem may be side-stepped by charging conspiracy or attempt instead of the full offence (*A-G, ex parte Rockall* [2000] 1 WLR 882: see B15.11.

93 The reference to "public authorities of all descriptions" in the definition of "public body" could not be construed as including either the Crown or a government department: *R. v. Natji* [2002] 2 Cr.App.R. 20, CA. The case was decided on rather special facts: in essence N was prosecuted under the wrong Act and the Court of Appeal suggested that he should have been prosecuted under the 1906 Act.

94 Section 7 of the 1898 Act provides, "The expression 'public body' means any council of a county or council of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, and includes any body which exists in a country or territory outside the United Kingdom and is equivalent to any body described above"

95 *DPP v. Holly and Manners* [1978] A.C. 43, HL

Corruption of Agents

128. Section 1(1) of the Prevention of Corruption Act 1906, creates three sets of offences. These offences have some similarity with the offences created under the 1898 Act (not least in the inclusion, in the first two offences, of the requirement that the gift or consideration is 'corrupt').[96]

> If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or
>
> If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or
>
> If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;
>
> he shall be guilty of [an offence]....

129. These offences are prospectively repealed by s.17(3) and schedule 2 of the Bribery Act 2010.

Acts of bribery and corruption committed abroad: s.109, ATCSA 2001

130. Section 109(1) of the Anti-terrorism, Crime and Security Act 2001, applies to a a national[97] of the UK, or a body incorporated under the law of any part of the UK, who does anything in a country or territory outside that jurisdiction. the United Kingdom, *and* the act would, if done in the UK, constitute a corruption offence, namely, (a) any common law offence of bribery; (b) the offences under s.1 PBCPA 1889 (corruption in office), (c) the first two offences under s.1 of the PCA 1906 (bribes obtained by or given to agents). Sections 108 to 110 of the 2001 Act are prospectively repealed by s.17(3) and schedule 2 of the Bribery Act 2010.

[96] The editors of *Blackstone's Criminal Practice 2011* point out that "the definition of an agent in the Prevention of Corruption Act 1906, s. 1(2) and (3), is supplemented by the Prevention of Corruption Act 1916, s. 4(3), which provides that a person serving under any other public body within the meaning of that Act is an agent for the purposes of the 1906 Act.": B15.16.

[97] See s.1(4) of the 2001 Act.

Concluding remarks

131. Although the BA 2010 is relatively short, some provisions will give rise to difficult problems of construction, notably in relation to the mental element required to be proved. In relation to those statutory provisions of the 2010 Act where the defendant is expressed to shoulder a burden of proof, the courts may have to decide whether the burden is persuasive or evidential. Much has been said in the media concerning the potential reach of the new offences. However, in practice, there may be less cause for concern than is sometimes suggested. Quite apart from the requirement to obtain 'consent to prosecute' (s.10), prosecutorial discretion will no doubt play a significant role in prosecuting only those cases that warrant such action. The shift in statutory language from notions of 'corruption', to the normative notion of "what is expected", by reasonable people in the UK, arguably lowers the threshold for criminalising conduct that would not previously have been so labelled. However, it must be remembered that it is not simply the prospect of conviction and punishment that gives the 2010 Act its teeth but other legislation may come into play (such as the civil recovery provisions of the Proceeds of Crime Act 2002) in respect of which the conduct of a person (whether an individual or legal entity) may be held to constitute "criminal conduct" notwithstanding the absence of a conviction for an offence charged under the 2010 Act.

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