



The Attorney General of the
Falkland Islands

AGG50

THE ATTORNEY GENERAL'S GUIDANCE TO PROSECUTORS ON THE PROSECUTION OF BRIBERY OFFENCES

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Foreword

The Falkland Islands pride themselves on seeking to achieve high international standards. The working arrangement with Her Majesty’s Government in London means that the United Kingdom’s international treaty obligations are only extended to the Falkland Islands with the consent of Members of the Legislative Assembly.

The United Kingdom is signatory to a number of international anti-corruption instruments not all of which extend to the Falkland Islands. That does not mean to say, however, that the Falkland Islands do not conduct themselves in accordance with high international standards.

In his foreword to the 2004 United Nations Convention against Corruption (“UNCAC”) the then UN Secretary General, Kofi Annan, described the serious effects of corruption:

“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish ... Corruption is a key element in economic under-performance and a major obstacle to poverty alleviation and development.”

The Falkland Island Government is committed to a society free from corruption. It maintains these standards even in the context of economic pressures from Argentina, which, despite the good relationship the Falkland Islands has with other South American Countries, can make the commercial realities of international shipping and commerce difficult.

Part 20 of the Crimes Ordinance reflects the Falkland Island’s continued commitment to combat bribery and provides a modern, comprehensive scheme of bribery offences. Part 20 covers all forms of bribery but there is a clear focus on commercial bribery, evidenced by the fact that two of the four offences therein are business related.

Part 20 also creates protection for ethically run business by creating the statutory “adequate procedures” defence to a failure of commercial organisations to prevent bribery encourages such bodies to put procedures in place to prevent bribery by persons associated with them.

The Ordinance is not intended to penalise ethically run companies that encounter an isolated incident of bribery. The provisions are designed to balance corporate responsibility for ensuring ethical conduct in the modern international business environment with the public interest in prosecuting where appropriate.

Given the unique political position occupied by the Falkland Islands the prosecution of bribery offences under the Crimes Ordinance requires careful guidance. This guidance is designed to provide careful direction to prosecutors when they are considering whether to bring charges for offences of bribery with the ultimate safeguard against unwarranted prosecution being that the Attorney General must consent before any proceedings are commenced.

This means that the people of the Falkland Islands can feel safe in the knowledge that their law reflects high international standards and aids the necessary fight against corruption whilst ensuring that factors unique to this jurisdiction are fully considered by expert prosecutors in accordance with this guidance and ultimately the Attorney General before any prosecution for offences of bribery are commenced.

Simon Young
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Introduction

Part 20 of the Crimes Ordinance (sections 490 to 506 inclusive) brings bribery laws in the Falkland Islands up to date and confirms the existing law.

The Ordinance applies to the whole of the Falkland Islands and provides for wide extra-territorial jurisdiction to deal with bribery committed outside the Falkland Islands. This is important because in today’s globally connected economy bribery offences are often multi-jurisdictional. The provisions of the Ordinance create similar terms which apply in England and Wales by virtue of the Bribery Act 2010.

The guidance provides an overview of the legal framework of Part 20 and then goes on to consider how prosecutors should approach applying the Attorney General’s Code for Prosecutors (AGG2) when considering alleged bribery offences and the specific considerations which may apply.

The Legal Framework

This guidance provides a summary of the legal framework and is not intended as a substitute for the full legislative text to which the reader is respectfully referred. In summary Part 20 of the Ordinance:

- provides a revised framework to combat bribery in the public or private sectors, removing the need to prove acts were done corruptly or dishonestly;
- abolishes the offences of bribery at common law and all relevant applied imperial enactments;
- provides two general offences of bribing another person (“active bribery”) (s.490) and being bribed (“passive bribery”) (s.491);
- provides a discrete offence of bribery of a foreign public official (s.495);
- provides an offence of failure of commercial organisations to prevent bribery by persons associated with them (s.496);
- requires the Governor to publish guidance about procedures that relevant commercial organisations can put in place to prevent bribery by persons associated with them (s.498); see AGG49 Public Guidance on Offences of Bribery;
- preserves the offence of misconduct in a public office which carries a maximum penalty of 14 years imprisonment (s.499);
- preserves the need for Attorney General’s consent under (s.500)
- provides a maximum penalty of 10 years’ imprisonment or an unlimited fine for all the offences for individuals, and an unlimited fine only for commercial organisations;
- provides jurisdiction to prosecute bribery committed abroad by any person (individual or corporate) who has a ‘close connection’ with the Falkland Islands (s.501);
- provides a limited defence for certain action taken in the furtherance on National Security or by the armed forces (s.502);

- provides that senior officers of a body corporate may be prosecuted if an offence is proved to have been committed by a corporate body with their consent or connivance (s.503);
- applies equally to individuals in the public service of the Crown as it applies to other individuals (s.505) but not to Crown bodies.

The Scope of the Ordinance

The Ordinance takes a robust approach to tackling commercial bribery, which is one of its principal objectives. The offences are not, however, limited to commercial bribery. There may be many examples outside the commercial sphere where individuals attempt to influence the application of rules, regulations and normal procedures. Examples would include attempts to influence the judiciary, regulatory bodies or elected representatives on matters such as court cases, planning consent, school admission procedures or driving tests.

Key Terms Used in Part 20 of the Ordinance

(i) Offers and requests

The ordinance uses everyday language of offering, promising or giving (“active bribery”), requesting, agreeing to receive or accepting an advantage (“passive bribery”).

This language is wide enough to include cases in which an offer, promise or request can only be inferred from the circumstances. A classic example is of a commercial proposal put forward to another person over an open briefcase full of money that could be seen as an implied offer to bribe. It will be a matter for the tribunal of fact to decide whether such an inference can be drawn from the evidence in each case.

It is also clear that, except where the allegation is that an advantage was given or received; there is no need for a transaction to have been completed. The offences focus on conduct not results.

(ii) Financial or other advantage

All the offences under the Ordinance refer either directly or indirectly to a “financial or other advantage”. The Ordinance does not define the term. It is left to be determined as a matter of common sense by the tribunal of fact. “Advantage” should therefore be understood in its normal, everyday meaning.

(iii) Improper performance

The concept of improper performance is central to the general bribery offences and also indirectly to the offence of failure of commercial organisations to prevent bribery, since an offence of failing to prevent bribery requires a general bribery offence to have been committed.

Improper performance involves a breach of an expectation of “good faith”, “impartiality” or “trust” in respect of the function or activity carried out. The test of what is expected is a test of what a reasonable person in the Falkland Islands would expect in relation to the performance of the type of function or activity concerned.

(iv) Associated Person

A commercial organisation (‘C’) can be liable only for bribes by an “associated person” (‘A’).

Whether ‘A’ is associated with ‘C’ is determined by the nature of what is done (disregarding any bribe under consideration) rather than the capacity in which it is done. It is necessary to take into account all the relevant circumstances, not just the nature of the relationship. For example services can be performed by one legal person on behalf of another legal person.

‘A’ may therefore, for example, be the commercial organisation’s employee, agent or subsidiary of the organisation. Where ‘A’ is an employee it is presumed that ‘A’ is performing services for or on behalf of ‘C’ unless the contrary is shown.

The Offence of Bribing Another Person

The legal elements

The ways in which the offence of bribing another person can be committed are contained in two ‘Cases’ set out in Part 20. The necessary conduct element is when a person “offers, promises or gives” a “financial or other advantage”, either directly or through a third party. The offence also requires a “wrongfulness element”.

In Case 1, the wrongfulness element is committed where the advantage is intended to induce (or be a reward for) improper performance of a relevant function or activity.

In Case 2, the wrongfulness element is committed where the person knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.

The Offence of Being Bribed

The legal elements

There are a number of ways in which the offence of being bribed can be committed and distinguishes four ‘Cases’, namely Case 3 to Case 6. The cases use the same concepts of “financial or other advantage”; “relevant function or activity”; and “improper performance” as discussed above.

Failure of Commercial Organisations to Prevent Bribery

(i) The legal elements

A “relevant commercial organisation” will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation, but only if the associated person is or would be guilty of a bribery offence.

There is no requirement for there to have been a prosecution for the predicate offences but there needs to be sufficient evidence to prove the commission of such an offence to the normal criminal standard. For this purpose it is not necessary for the associated person to have a close connection with the Falkland Islands.

The jurisdiction for this offence is wide. Provided that the commercial organisation is incorporated or formed in the Falkland Islands, or that the organisation carries out its business or part of its business in the Falkland Islands, the courts will have jurisdiction, irrespective of where in the world the acts or omissions which form part of the offence may be committed.

The offence is not a substantive bribery offence. It does not involve vicarious liability and it does not replace or remove direct corporate liability for bribery. If it can be proved that someone representing the corporate ‘directing mind’ bribes or receives a bribe or encourages or assists someone else to do so then it may be appropriate to charge the organisation with a substantive offence in the alternative or in addition.

(ii) The defence of adequate procedures

It is a defence if a relevant commercial organisation can show it had adequate procedures in place to prevent persons associated with it from bribing. The standard of proof the defendant would need to discharge in order to prove the defence is on the balance of probabilities. Whether the procedures are adequate will ultimately be a matter for the courts to decide on a case by case basis.

The Offence of Bribing Foreign Public Officials

The legal elements

The Ordinance creates a discrete offence of bribery of a foreign public official. The offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions.

That person must also intend to obtain or retain business or an advantage in the conduct of business. The official must be neither permitted nor required by the applicable written law to be influenced by the advantage.

Bribery of foreign public officials may also be prosecuted, in appropriate cases, under the general offence of bribery, making use of the extended extra-territorial jurisdiction. This may be the case, for example, if it is difficult to prove that the person bribed is a foreign public official. It should be noted, however, that if prosecuted under the general offence it will be necessary to prove the improper performance element.

Guidance for Commercial Organisations

Section 498 of the Ordinance requires the Governor to publish guidance on procedures that relevant commercial organisations can put in place to prevent bribery by persons associated with them. This has been done as part of the Attorney General’s Guidance (AGG) series and AGG49 Public Guidance on Offences of Bribery is available on the Attorney General’s web pages at <http://www.fig.gov.fk/legal/>.

The General Approach to Bribery Prosecutions

Bribery is a serious offence. There is an inherent public interest in bribery being prosecuted in order to give practical effect to the criminalisation of such behaviour.

As with all other criminal offences, however, prosecutors will make their decisions in accordance with the test as set out in the Attorney General’s Code for Prosecutors.

The test has two stages:

- (i) the evidential stage; and
- (ii) the public interest stage.

The evidential stage must be considered before the public interest stage. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive the circumstances may be.

Where there is sufficient evidence to justify a prosecution, prosecutors must always go on to consider whether a prosecution is required in the public interest. Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. The absence of a factor does not necessarily mean that it should be taken as a factor tending in the opposite direction. Each case will have to be rigorously considered on its own facts and merits in accordance with the Code.

Considering the Public Interest

General Public Interest Factors

Different types of criminality attract different public interest considerations but in general terms prosecutors will consider the following matters in deciding whether or not a prosecution is in the public interest.

- How serious is the offence committed?
- What is the level of culpability of the suspect?
- What are the circumstances of and the harm caused to the victim?
- What is the impact on the community?
- Is prosecution a proportionate response?

Specific Public Interest Factors Relating to Bribery

In addition to the general factors set out above the presence of the following specific factors in bribery cases may tend in favour of prosecution:

- Where the offence is one that is likely to attract a significant sentence on conviction
- Where the offence alleges large or repeated payments
- Where the alleged offence was premeditated and planned
- Where the alleged offence involves the corruption of a public official
- In respect of an individual where they have chosen to ignore the clear and appropriate policy against bribery of a commercial organisation by whom they are engaged.

The following specific factors may tend against prosecution:

- Where the offence is one that is likely to attract a nominal penalty
- Where the harm caused can be described as minor or was the result of a single incident
- Where there has been a genuinely proactive approach against bribery involving self-reporting and remedial action and where the guidance contained in AGG49 has been followed.

- Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if payments are requested and these have been correctly followed
- Where the payer was in a vulnerable position arising from the circumstances in which the payment was demanded

Facilitation Payments

Facilitation payments are unofficial payments made to public officials in order to secure or expedite the performance of a routine or necessary action. They are sometimes referred to as 'speed' or 'grease' payments. The payer of the facilitation payment usually already has a legal or other entitlement to the relevant action.

There is no exemption in respect of facilitation payments. They were illegal under the previous law and the common law and remain so under the Ordinance.

Prevention of bribery of foreign public officials is a significant policy aspect of the Ordinance. In the context of facilitation payments, the following public interest factors tending in favour of and against prosecution may be relevant. A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour.

Factors tending in favour of prosecution:

- Large or repeated payments
- Facilitation payments that are planned for or accepted as part of a standard way of conducting business where this is evidence of premeditation
- Active and continued corruption of public officials
- Failure to follow an organisations clear and appropriate policy to avoid facilitation payments

Factors tending against prosecution:

- A single small payment or isolated incident.

- The payment comes to light as a result of a genuinely proactive approach involving self-reporting and remedial action.
- A commercial organisation has a clear and appropriate policy setting out procedures to be followed if facilitation payments are requested and clear evidence that all reasonable and proportionate steps were taken to avoid such payments being made.
- Where the payer was in a vulnerable position arising from the circumstances in which the payment was demanded.
- Where there are clear national security interests that accounted for the facilitation payment.

Further copies of this document and information about alternative languages and formats are available from the Law and Regulation Directorate.

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This Document is also available online at: <http://www.fig.gov.fk/legal/>

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