

EXPLANATORY MEMORANDUM TO
THE BRIBERY ACT 2010 (CONSEQUENTIAL AMENDMENTS) ORDER 2011

2011 No. 1441

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Order makes consequential amendments to secondary legislation to take account of the abolition of the common law offences of bribery and embracery, and the repeal of the Public Bodies Corrupt Practices Act 1889, and the Prevention of Corruption Acts 1906 and 1916 by the Bribery Act 2010 (“the Act”).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 There are no matters of special interest to the Joint Committee on Statutory Instruments.

4. Legislative Context

4.1 The Act received Royal Assent on 8 April 2010 at which point certain of its provisions came into force. The Act creates a new scheme of offences to replace the common law offences of bribery and embracery, and the statutory offences contained in the Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Acts 1906 and 1916 (known collectively as the Prevention of Corruption Acts 1889-1916) which will be repealed in their entirety by the Act. The Secretary of State has made an order under section 19(1) of the Act on 7 June 2011 (The Bribery Act 2010 (Commencement) Order 2011 (S.I. 1418 (C. 54)) bringing the remaining provisions of the Act into force on 1st July 2011.

4.2 Section 17(4) of the Act enables the Secretary of State, by order, to make such supplementary, incidental or consequential provision as considered appropriate. The order is subject to negative resolution where, as in this case, it does not amend a public general Act or devolved legislation.

5. Territorial Extent and Application

5.1 This Order extends to the UK. The amendments in the Order will have the same application as the instruments which they amend.

6. European Convention on Human Rights

6.1 As the Order is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The purpose of the Act is to reform the criminal law of bribery to provide for a new scheme of bribery offences to cover bribery both in the United Kingdom and abroad.

7.2 The Act creates two general offences, covering cases of bribing another person (section 1) and cases of being bribed (section 2). It also creates a discrete offence of bribery of a foreign public official (section 6) and an offence of failure by commercial organisations to prevent bribery (section 7). It abolishes the common law offences of bribery and embracery, and repeals entirely the Public Bodies Corrupt Practices Act 1889, and the Prevention of Corruption Acts 1906 and 1916.

7.3 In consequence of the creation of new offences and the repeal of old offences, references in secondary legislation to those offences will need to be amended. For the most part, the Order either supplements or substitutes references to the common law offences of bribery and embracery, and offences under the Prevention of Corruption Acts, with references to the relevant new offences under the Act. This is necessary to maintain the original intended effect of those provisions.

7.4 The Extradition Act 2003 (Parties to International Conventions) Order 2005 (S.I. 2005/46) designates those territories who are party to certain international conventions to which the United Kingdom is also a party, so that any extradition requests for conduct covered by the convention in question are brought within the ambit of the 2003 Act. References to the common law offence of bribery and to the corruption offences under the Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Act 1906, in relation to Japan and the Republic of Korea as signatories to the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials, are now substituted with references to the offences under section 1 and 6 of the Act. This is consistent with the scope of the Convention.

7.5 The Public Contracts Regulations 2006 (S.I 2006/5) implement Directive 2004/18/EC of the European Parliament and Council of 31st March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public services contracts (OJ L134, 30.4.2004, p114). Regulation 23(1) includes in the criteria for rejection of suppliers commission of the common law offence of bribery, and corruption within the meaning of the Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Act 1906. References to these offences will be retained to cover historic offences but will be supplemented with references to offences under section 1 and 6 of the Act. This is consistent with the scope of the Directive.

7.6 The Utilities Contracts Regulations 2006 (S.I. 2006/6) implement Directive 2004/17/EC of the European Parliament and Council of 31st March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ No L 134, 30.4.2004, p.1). Regulation 26(1) includes in the criteria for rejection of suppliers commission of the common law offence of bribery, and the offence of corruption within the meaning of the Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Act 1906. References to these offences will be retained to cover historic offences, but supplemented with references to offences under section 1 and 6 of the Act. This is consistent with the scope of the Directive.

7.7 The National Assembly for Wales (Representation of the People) Order 2007 (S.I. 2007/236) makes provision for the conduct of elections to the National Assembly for Wales. Article 117 relates to the situation where a candidate engages a canvasser or agent who is subject to an incapacity to vote. By article 117(2)(b), having been convicted more than once of an offence under the Public Bodies (Corrupt Practices) Act 1889 amounts to an incapacity to vote. Article 117(2)(b) is repealed in its entirety to maintain consistency with the approach taken in Schedule 2 (repeals and revocations) to the Act in respect of section 165 of the Representation of the People Act 1983 on which article 117 is based.

7.8 The Criminal Defence Service (Funding) Order 2007 (S.I. 2007/1174) provides for the remuneration of advocates in publicly funded criminal cases. References to the common law offence of embezzlement and to the offences under the Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Act 1906 in part 6 (table of offences) of Schedule 1 are supplemented with references to the offences under sections 1, 2 or 6 of the Act. The offence under section 7 is outside the scope of the Criminal Defence Service.

7.9 Schedule 8 to the Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2010 (S.I. 2010/1903) specifies events which would disqualify participants from a tender exercise. The Order amends paragraph 1(e) of Schedule 8 to replace the reference to a breach of the Prevention of Corruption Acts 1889-1916 with a reference to a breach of section 1, 2 or 6 of the Act.

8. Consultation outcome

8.1 The Government does not consider that consultation was necessary on the consequential amendments contained in the Order.

9. Guidance

9.1 The Act and guidance issued under section 9 of the Act have already received extensive publicity (<http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm>). The Government intends to issue a circular to bring the commencement of the Act to the attention of those operating in the criminal justice system. There are no plans for further guidance in relation to this Order.

10. Impact

10.1 An Impact Assessment was prepared for the Bribery Bill when it was introduced in November 2009 (<http://www.justice.gov.uk/downloads/publications/bills-acts/bribery-bill-ia.pdf>).

10.2 An Impact Assessment has not been prepared in respect of the consequential amendments Order because it does not impose or reduce costs for business, charities or voluntary bodies. This is also the case for the public sector.

11. Regulating small business

11.1 The Act, as mainstream criminal law, has general application. The Act includes a new offence of failure by commercial organisations to prevent bribery. Guidance about the procedures commercial organisations can put in place to prevent bribery has been published under section 9 of the Act. The guidance is not prescriptive and is intended to be applicable to commercial organisations of all sizes. A quick start guide, intended to be of particular assistance to small businesses, has also been published (see paragraph 9.1 above).

11.2 There are no additional implications for small businesses arising from this Order.

12. Monitoring & review

12.1 The Act will be subject to the normal post-legislative scrutiny procedures.

13. Contact

Roderick Macauley or Matthew Pyne at the Ministry of Justice Tel: 0203 334 5010/5023 or email: Roderick.Macauley@justice.gsi.gov.uk or Matthew.Pyne@justice.gsi.gov.uk can answer any queries regarding the instrument.