1. **Recommendations**

1.1 Honourable Members are recommended to:

(a) approve the policy principles outlined under Paragraph 4 for the amendment of the Crimes Ordinance 2014 and instruct the Attorney General to prepare the necessary amending legislation;

(b) note and approve the Implementation Plan set out under Appendix 1 to this Paper; and

(c) note that as a result of the extensive work required under the Implementation Plan (Appendix 1) the anticipated commencement date for the two Ordinances will be March 2017.

2. **Additional Budgetary Implications**
2.1 None.

3. Executive Summary

3.1 The purpose of this Paper is to –

(a) invite Executive Council to approve the recommendations for the policy principles set out under Paragraph 4 which will lead to the amendment of the Crimes Ordinance 2014;

(b) agree that the arrangements in relation to bribery are adequate and that these provisions should be commenced with the remainder of the Crimes Ordinance 2014.

4. Background and Links to Islands Plan and Directorate Business Plan/s including Options and Reasons for Recommending Relevant Option

Under the Islands Plan 2014-2018 the Legislative Assembly has committed to “introduce a new criminal code to improve criminal evidence and sentencing procedures as well as to ratify international treaties to tackle global corruption, bribery and the financing of terrorism” (objective relating to Self-determination and Good Governance – ninth and tenth commitments)

Part of the mission statement of the Law and Regulation Directorate as stated under the Attorney General’s Corporate Directorate Business Plan which sets out the Directorate’s Response to the Islands Plan is a commitment to “promote public confidence in the rule of law” by improving the prosecution service to ensure that witnesses and victims of crime have the confidence to come forward and know that all criminal complaints will be taken seriously.

Crimes Ordinance 2014

4.1 Questions about Part 20 – Bribery

Members of the Legislative Assembly and Executive Council members have asked questions about the implementation of Part 20 of the Crimes Ordinance 2014.

Background

The Falkland Islands currently has anti-bribery legislation in the form of criminal offences for theft, fraud and misfeasance in public office. The extra-territorial provisions of Part 20 are almost identical to the provisions of the Bribery and Corruption Overseas Ordinance 2006 which the Legislative Assembly passed into law. This Ordinance makes it a criminal offence if a resident of the Falkland Islands, outside of the jurisdiction, commits the common law offence of bribery, commits an offence of corruption in office contrary to the Public Bodies Corrupt Practices Act 1889 or engages in bribery by agents contrary to the Prevention of Corruption Act 1906. In summary it is currently a criminal offence to bribe within the jurisdiction and outside of the jurisdiction. The Attorney General is not aware of any prosecutions that have been brought in relation to these provisions.
Current law

The current anti-bribery legislation is now aged and lacks clarity as it relies on legislation that is over one hundred years old. The new law proposed reflects modern international standards including international conventions against bribery of foreign public officials and anti-corruption more generally. Part 20 of the Crimes Ordinance 2014 meets these aims.

Part 20 of the Crimes Ordinance 2014

Part 20 of the Crimes Ordinance does not introduce anti-bribery law to the Falkland Islands; it takes the existing law and sets it out clearly. Offences of offering or receiving bribes, bribery of foreign public officials and of failure to prevent a bribe being paid on an organisation’s behalf are clearly defined in a single piece of legislation.

Importantly Part 20 sets out a statutory defence to allegations of bribery. It is a full defence for an organisation to prove that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. This offers organisations much greater protection then they currently have under the existing law.

The Attorney General’s Guidance

As part of the Attorney General’s ambition to provide greater certainty and transparency to the public and to provide greater consistency by giving direction to prosecutors the Attorney General will be issuing and publishing a series of guidance notes, to be known as the Attorney General’s Guidance to Prosecutors Series (the AGG series). This series deals with specific topics related to the prosecution of criminal offences. These guidance notes will be issued and published once the Ordinances are commenced. The two guidance notes that specifically relate to bribery are:

AGG49 Public Guidance on Offences of Bribery (Appendix 2);
AGG50 The Attorney General’s Guidance to Prosecutors on the Prosecution of Bribery Offences (Appendix 3).

AGG49 gives clear and comprehensive guidance on the provisions of Part 20 and helps organisations by explaining the law and suggesting measures that can be taken to avoid being seen to commit an offence of bribery.

AGG50 is a publicly available document and contains guidance for prosecutors who are deciding whether to bring charges for alleged bribery offences. By reading this guidance organisations can identify the factors that weigh in favour or against prosecution and this will help them in their fight against bribery and corruption. This guidance will also assist them in the development of their own anti-corruption systems.

Recommendation
The provisions in the Crimes Ordinance 2014 satisfy the requirement to have modern bribery and anti-corruption legislation to comply with international treaty obligations.

They also update the law and provide clear guidance to organisations to allow them to operate with certainty within a clear legal framework. The Attorney General’s Guidance documents provide the detail for this.

4.2 Proposed amendments to the Crimes Ordinance

4.2.1 Reasonable Punishment

Background

Our law treats children and adults as equals and seeks to protect them from harm by making unlawful assaults against them criminal offences. Parents exercise rights, and have responsibility for, their children and historically the law has recognised that there may be occasions where a parent wishes to administer physical punishment to their child. As such reasonable physical punishment can be a defence for a parent against a charge of assaulting their child.

The law has developed over time in accordance with social standards. For example the class of people able to administer reasonable punishment – being parents and people who stood in the place of parents (in loco parentis) including the state, for example schools – was quite wide.

Over time and the class of people who are deemed as being appropriate to administer reasonable physical punishment has narrowed. Section 66 of the Education Ordinance 1989 prohibits the use of corporal punishment in schools. The effect of this provision was to outlaw in the Falkland Islands the physical punishment of children by teachers.

Despite this measure, introduced over 25 years ago, the Falkland Islands have not fully outlawed corporal punishment as has been done in other jurisdictions (and which would be consistent with the Global Initiative to End All Corporate Punishment of Children). To bring Falkland Islands law into line with international standards it is therefore proposed that the law be changed to address this.

In terms of what is reasonable it has always been the case in law that any physical punishment of a child should be moderate in the manner, the instrument and the quantity.

Just as society’s attitude changed concerning who was entitled to administer physical punishment what is accepted as being moderate in manner, instrument and quantity has also changed. For example the use of an instrument, such as a birch, to administer reasonable punishment is now considered inappropriate due to the level of injury that the use of such instrument inflicts. Accordingly it would not be the policy intention of the law change to outlaw physical punishment completely but to affect a moderation in what is permitted.

Current Law
At present the law relating to what constitutes reasonable punishment and what is unreasonable lacks clarity and relies on a body of case law that has developed over many years. This leaves parents vulnerable to accusations without knowing how the law allows them to act with any certainty.

**Recommendation**

There is a need for modern legislation that adheres to international standards in respect of child safeguarding and given the Falkland Islands’ particular commitment to compliance and its stance regarding child safeguarding the proposed solution is to amend the Crimes Ordinance 2014 and insert the following provision:

**Section 70A of the Crimes Ordinance 2014**

70A - Reasonable punishment  
(1) In relation to any offence specified in subsection (2), battery of a child cannot be justified on the ground that it constituted reasonable punishment.

(2) The offences referred to in subsection (1) are—

(a) an offence under section 64 or 65 of this Ordinance (wounding and causing grievous bodily harm);

(b) an offence under section 71 of this Ordinance (assault occasioning actual bodily harm); and

(c) an offence under section 82 of this Ordinance (cruelty to persons under 16).

(3) Battery of a child causing actual bodily harm to the child cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment.

(4) For the purposes of subsection (3) “actual bodily harm” has the same meaning as it has for the purposes of section 71 of this Ordinance.

(5) Battery of a child can only be justified on the ground that it constituted reasonable punishment if the battery is administered by a person who holds parental responsibility for the child.

The purpose of section 70A is to bring certainty to this area without changing the established principles. The defence of reasonable punishment of a child is preserved by the law but it establishes more clearly the threshold beyond which physical punishment will not be deemed to be reasonable.

In order to explain how section 70A operates it is necessary to briefly define some specific legal terms. The criminal law recognises four different types of assault which increase in severity depending on the injury suffered.

Common Assault – Includes all forms of assault where the injury inflicted is minor. (For example contact resulting in no injury or light discoloration to the skin).
Causing Actual Bodily Harm – Includes all forms of assault where the injury inflicted results in some harm which is more than merely transient or trifling. (For example contact resulting in bruising or splitting of the skin or minor fractures or breaks of bones).

Wounding and Causing Grievous Bodily Harm – Includes all forms of assault where the injury suffered amounts to really serious harm which involves the splitting of the skin.

Intentionally Wounding and Causing Grievous Bodily Harm – Includes all forms of assault where the injury inflicted amounts to really serious harm which involves the splitting of the skin and where the person who inflicted the injury intended to cause serious harm.

Section 70A operates to make it clear that an assault on a child cannot be justified on the grounds that it constitutes reasonable punishment where the injury inflicted on the child amounts to actual bodily harm or grievous bodily harm. Punishment can therefore never be reasonable if it results in an injury that amounts to more than common assault.

4.2.2 Minefields

Background

Commander British Forces intends to relinquish responsibility for the regulation of minefields for which he has been responsible for under section 12 of the Crimes Ordinance 1989. If FIG accedes to this request, the officer of Government best suited to adopt this role is the Director of Emergency Services.

This will require an amendment to the provisions of the Crimes Ordinance 2014 that relate to offences involving minefields. Given that FIG has no capacity to deal with unexploded ordinances or mines nor holds any information about historic minefields (which is held by the MoD) this proposal to change the law depends on there being satisfactory arrangements between FIG and the MoD.

Current Law

Section 187 of the Crimes Ordinance 2014 provides as follows:

187. Offences related to minefields
(1) A person who —

(a) wilfully enters a minefield without lawful authority; or

(b) without lawful authority wilfully causes a mine to explode or attempts so to do; or

(c) without lawful authority wilfully cuts or removes any part of any fence dividing any minefield from any other land; or
(d) without lawful authority removes, damages or obscures any sign or notice warning of the existence of or depicting the boundaries or a boundary of a minefield, or warning of the possibility that mines may be found in the vicinity; or

(e) wilfully drives any animal into a minefield,

commits an offence.

Penalty: Imprisonment for 12 months or a fine at level 4 on the standard scale, or both

(2) For the purposes of subsection (1), “without lawful authority” means without authority given by or on behalf of the Commander British Forces.

Recommendation
If this proposal is agreed an amendment to section 187(2) is required that will replace the words “Commander British Forces” with the words “Director of Emergency Services or the person discharging the role of Director of Emergency Services”.

The amendment will mean that the power to grant lawful authority to undertake activity in relation to mines and minefields will rest with the officer of the Director of Emergency Services.

5. Resource Implications

5.1 Financial Implications
It is assumed that no additional funds are required and that this will be met out of the existing budgets of the Law and Regulation Directorate, RFIP and the Courts and Tribunal Service.

5.2 Human Resource Implications
Refer to the Implementation Plan

5.3 Other Resource Implications
None

6. Legal Implications
As set out under paragraph 4 the Attorney General will bring amending Bills for both Ordinances before Executive Council for approval depending on the outcomes of this Paper.

7. Environmental & Sustainability Implications
None

8. Significant Risks
None
9. **Consultation**

9.1 The Portfolio holder and his deputy (MLA Roger Edwards and Mike Summers) have been briefed on these proposed amendments. The plan for steps to implement the Ordinances has been discussed in the Legislative Assembly following a motion on the status of the Bills since passage in the Assembly.

9.2 More consultations and training with the relevant stakeholders will be undertaken and these are outlined in the Implementation Plan (Appendix 1)

10. **Communication**

10.1 The Implementation Plan is being used to track the progress of the various actions and Executive Council will be briefed from time to time as and when the completed actions are presented to them for approval where required. The Implementation Plan covers training for police officers and other relevant users.

10.2 Training and communication with the public on issues from the Implementation Plan will be done where necessary and a communication plan will be put in place to give effect to this.
CRIMES ORDINANCE 2014 AND THE CRIMINAL PROCEDURE AND EVIDENCE ORDINANCE 2014
IMPLEMENTATION PLAN – 04.11.2016

This implementation plan broadly describes four current work streams of activity:

(A) Primary legislation
(B) Secondary legislation and procedural rules
(C) Underpinning court forms and guidance documents
(D) Administrative activities
(E) Training and public engagement
(F) Practitioners’ text

In respect of time and cost it is anticipated that each department and service will be able to deliver the work or training within their departmental budget. The implementation plan has already had considerable investment of time. Although the work of departments can be concurrent this depends upon capacity. It most likely amounts to three to eleven weeks of concurrent work across three Government departments plus engagement with ExCo, the Assembly and the CJC. A stretched target for commencement is for commencement of the Bills in **March 2017**. Below each section title is an estimate of the number of working hours required to complete the work stream activities from the date of this version of the plan. There is not the capacity within departments to accommodate the working hours required using the standard available time. Departments have been working, and will continue to work, extended hours to complete the work streams.

Each section of the implementation plan sets out the item of work to be completed, states whether the work is necessary before commencement and identifies the lead department.

Progress is identified using a red, amber and green colouring system. Red denotes a piece of work that has not begun, but is regarded as a priority, or is in the very early stages, amber a piece of work or similar priority that is partly completed and green a piece of work that is very nearly or wholly completed.

Urgency is identified using a numbering system with “1” denoting a piece of work that is most urgent, “2” a piece of work that is fairly urgent and “3” a piece of work that is the least urgent.

This example denotes a piece of work that is very nearly completed and fairly urgent.
<table>
<thead>
<tr>
<th>NO.</th>
<th>ITEM OF WORK</th>
<th>IS THE WORK NECESSARY PRE-COMMENCEMENT</th>
<th>LEAD DEPARTMENT</th>
<th>PROGRESS URGENCY</th>
<th>STATUS AS AT NOVEMBER 2016</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PRIMARY LEGISLATION</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total Hours Required – 152</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Law and Regulation (Drafting) – 75</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Law and Regulation (Policy) – 75</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Legislative Assembly - 1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ExCo – 1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A1</td>
<td>THE CRIMINAL PROCEDURE AND EVIDENCE ORDINANCE 2014</td>
<td>Yes</td>
<td>Law and Regulation</td>
<td>1</td>
<td>Awaiting assent</td>
</tr>
<tr>
<td>A2</td>
<td>THE CRIMES ORDINANCE 2014</td>
<td>Yes</td>
<td>Law and Regulation</td>
<td>1</td>
<td>Awaiting assent</td>
</tr>
<tr>
<td>A3</td>
<td>THE CRIMINAL PROCEDURE AND EVIDENCE ORDINANCE 2014 –</td>
<td>YES – Minor amendments and provisions</td>
<td>Law and Regulation</td>
<td>1</td>
<td>ExCo paper seeking approval of policy principles</td>
</tr>
<tr>
<td></td>
<td>AMMENDMENT BILL</td>
<td>relating to reasonable chastisement.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A4</td>
<td>THE CRIMES ORDINANCE 2014 – AMMENDMENT BILL</td>
<td>Yes – Minor amendments and amendment</td>
<td>Law and Regulation</td>
<td>1</td>
<td>ExCo paper seeking approval of policy principles</td>
</tr>
<tr>
<td></td>
<td></td>
<td>relating to authority over minefields</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A5</td>
<td>THE PROCEEDS OF CRIME ORDINANCE</td>
<td>No – But a complete revision of the</td>
<td>Law and Regulation</td>
<td>PRIORITY NOT YET</td>
<td>Proceeds of Crime is a complex legal area requiring additional approval of policy principles.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>criminal justice system will not be</td>
<td></td>
<td>DETERMINED (Not in Time Estimate)</td>
<td>Provisions have been drafted (originally for inclusion in the CPEO) but it was decided that separate legislation would be the most appropriate route due to the nature and number of provisions.</td>
</tr>
<tr>
<td>A6</td>
<td>REVISED - ADMINISTRATION OF JUSTICE ORDINANCE</td>
<td>No – This is overarching legislation and the criminal justice system can operate without the review having taken place.</td>
<td>The Courts Law and Regulation</td>
<td>PRIORITY NOT YET DETERMINED (Not in Time Estimate)</td>
<td>Policy review has commenced with the court.</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
</tbody>
</table>

**SECONDARY LEGISLATION**

**Total Hours Required – 95**

| Law and Regulation (Drafting) – 75 | CJC – 10 | The Police – 10 |

| B1 | Regulations Relating to the Recording, Storage and Access of Samples Taken From Suspects s.117 CPEO 2014 | No – The primary legislations deals with the principles but regulations dealing with how, where and by who are important for guarding rights to privacy and confidentiality as per constitution. | The Police CJC | 2 | Needs to be developed by the CJC in consultation with the police prior to going before ExCo. |

| B2 | Regulations Concerning Community Sentences s.554 CPEO 2014 | No – Community sentences can be passed. Regulations deal with how they will be specifically administered but this can be done under the current system. | Sentencing Council CJC | 2 | The Sentencing Council is part of the CJC and will develop guidelines prior to them going before ExCo. |

| B3 | Regulations Concerning Youth Maintenance Orders s.760 CPEO 2014 | No – A niche part of the criminal law that allows the court to make parents contribute financially in cases involving their children | CJC | 3 | Needs to be developed by the CJC prior to going before ExCo. |

<p>| B4 | Regulations to Ensure Compliance with International Law s.786 CPEO 2014 | No – This is a catch all provision which allows for the making of regulations to comply with international obligations. No areas for regulations under s.786 have been identified. | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th>Regulations about Seizure, Retention and Disposal of Property</th>
<th>No – Should be a priority shortly after commencement to regulate how the police store and dispose of seized property.</th>
<th>The Police</th>
<th>Needs to be developed by the CJC in consultation with the police prior to going before ExCo.</th>
</tr>
</thead>
<tbody>
<tr>
<td>B6</td>
<td>Custody Time Limit Rules</td>
<td>Yes – Regulates release of prisoners on expiry of custody time limits pending trial etc.</td>
<td>Law and Regulation. CJC</td>
<td>Drafted by Law and Regulation to be incorporated into the Criminal Procedure Rules to be developed by the CJC and approved by the Chief Justice.</td>
</tr>
</tbody>
</table>

**PROCEDURAL RULES**

Total Hours Required – **142.5**

- **CJC** – 30
- **Court** – 37.5
- **Law and Regulation (Drafting)** – 37.5
- **Law and Regulation (Policy)** – 37.5

|   | THE CRIMINAL PROCEDURE RULES S.785 – CPEO 2014 | No – but the procedural rules provide the framework for the operation of the criminal justice system so should be ready to come into force very shortly after commencement or ideally at the time of commencement. | Law and Regulation. CJC | A 30 PART set of procedural rules have been drafted by Law and Regulation and will be developed by the CJC prior to approval by the Chief Justice. |

<p>| B8 | PART 1 - THE OVERRIDING OBJECTIVE | | Law and Regulation. CJC | |
| B9 | PART 2 - UNDERSTANDING AND APPLYING THE RULES | | Law and Regulation. CJC | |
| B10 | PART 3 - CASE MANAGEMENT | | Law and Regulation. CJC | |</p>
<table>
<thead>
<tr>
<th>Part Number</th>
<th>Title</th>
<th>Law and Regulation CJC</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>PART 4 - SERVICE OF DOCUMENTS</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>PART 5 - FORMS AND COURT RECORDS</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>PART 6 - PROCEEDINGS IN PUBLIC</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>PART 7 - COMMENCING A PROSECUTION</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>PART 8 - INITIAL DETAILS OF THE PROSECUTION CASE</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>PART 9 - DISCONTINUING A PROSECUTION</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>PART 10 - CRIMINAL JURISDICTION</td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>PART 11 - ALLOCATION, TRANSFER, SENDING AND COMMITTAL</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>PART 12 - MODES OF ADDRESS AND COURT ATTIRE</td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>PART 13 - WARRANTS FOR ARREST, DETENTION OR IMPRISONMENT</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>PART 14 - BAIL AND CUSTODY TIME LIMITS</td>
<td></td>
</tr>
<tr>
<td>B22</td>
<td>PART 15 - PRELIMINARY APPLICATIONS</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>-----</td>
<td>-----------------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>B23</td>
<td>PART 16 - PLEA AND TRIAL PREPARATION HEARINGS</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B24</td>
<td>PART 17 - MEASURES TO ASSIST A WITNESS OR DEFENDANT TO GIVE EVIDENCE</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B25</td>
<td>PART 18 – DISCLOSURE</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B26</td>
<td>PART 19 - PROCEDURE AT SUMMARY TRIAL</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B27</td>
<td>PART 20 – JURIES</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B28</td>
<td>PART 21 - PROCEDURE AT TRIAL ON INDICTMENT</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B29</td>
<td>PART 22 - FORMS OF EVIDENCE</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B30</td>
<td>PART 23 - WRITTEN WITNESS STATEMENTS</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B31</td>
<td>PART 24 - EXPERT EVIDENCE</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B32</td>
<td>PART 25 - HEARSAY EVIDENCE</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B33</td>
<td>PART 26 - EVIDENCE OF BAD CHARACTER</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>-----</td>
<td>-------------------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>B34</td>
<td>PART 27 - EVIDENCE OF A COMPLAINANT’S PREVIOUS SEXUAL BEHAVIOUR</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B35</td>
<td>PART 28 - RESTRICTION ON CROSS-EXAMINATION BY A DEFENDANT</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B36</td>
<td>PART 29 - SENTENCING PROCEDURES</td>
<td>Law and Regulation CJC</td>
</tr>
<tr>
<td>B37</td>
<td>PART 30 - APPEALS TO THE SUPREME COURT</td>
<td>Law and Regulation CJC</td>
</tr>
</tbody>
</table>

**COURT FORMS**

Total Hours Required – 45
- Court - 37.5
- Law and Regulation (Policy) - 7.5

<table>
<thead>
<tr>
<th>C1</th>
<th>PTHP (Plea and Trial Preparation Hearing) Form</th>
<th>No – But must come into force at the same time as the CrimPR as it is an important part of case management.</th>
<th>Law and Regulation CJC</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Drafted by Law and Regulation and will be developed by the CJC prior to approval by the Chief Justice.</td>
<td>Drafted by Law and Regulation and will be developed by the CJC prior to approval by the Chief Justice.</td>
<td></td>
</tr>
<tr>
<td>C2</td>
<td>Revision of Court Forms</td>
<td>The CPEO and CrimPR replace provisions of the MCA 1980 and forms require revision to reference the new provisions. This will also provide an opportunity to number forms and make appropriate forms publicly available online for download.</td>
<td>The Court</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Description</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>------------------------------------------</td>
<td>---</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C3</td>
<td>Application for Disqualification Removal</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C4</td>
<td>Bail – Security</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C5</td>
<td>Bail – Conditions</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C6</td>
<td>Bail – Unconditional</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C7</td>
<td>Community Service Order</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C8</td>
<td>Directions</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C9</td>
<td>Disqualification Notice</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C10</td>
<td>Driving Offences Summons</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C11</td>
<td>Fines Summons</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C12</td>
<td>Forfeiture Order</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C13</td>
<td>Information – Probation</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C14</td>
<td>Notice of Acquittal</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C15</td>
<td>Notice of Adjournment</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C16</td>
<td>Notice of Conviction and Sentence</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ID</td>
<td>Description</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>----</td>
<td>--------------------------------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C17</td>
<td>Notice of Deferment of Sentence</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C18</td>
<td>Notice of Fine</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C19</td>
<td>Notice of Removal of Disqualification</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C20</td>
<td>Notice of Sending</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C21</td>
<td>Notice to Show Cause</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C22</td>
<td>Notification Order on Conviction</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C23</td>
<td>Notification to Register (Custody)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C24</td>
<td>Order for Conditional Discharge</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C25</td>
<td>Partly Suspended Sentence</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C26</td>
<td>Plea and Mitigation Form</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C27</td>
<td>Plea Form</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C28</td>
<td>Probation Order</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C29</td>
<td>Request for a Pre-Sentence Report</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C30</td>
<td>Revocation and Re-Sentence Order</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Code</td>
<td>Description</td>
<td>Count</td>
<td></td>
<td></td>
</tr>
<tr>
<td>------</td>
<td>----------------------------------------</td>
<td>-------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C31</td>
<td>Remand in Custody (Post Conviction)</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C32</td>
<td>Remand in Custody (Pre Conviction)</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C33</td>
<td>Sexual Offences Prevention Order</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C34</td>
<td>Statement of Means</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C35</td>
<td>Summons (Mental Health)</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C36</td>
<td>Summons (Witness)</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C37</td>
<td>Summons (Breach of Order)</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C38</td>
<td>Summons on Complaint</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C39</td>
<td>Summons to Parent or Guardian</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C40</td>
<td>Summons (General)</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C41</td>
<td>Supervision Order</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C42</td>
<td>Suspended Sentence Order</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C43</td>
<td>Warrant – Failure to Surrender</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C44</td>
<td>Warrant of Commitment</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>C45</td>
<td>Warrant of Commitment (Youth)</td>
<td></td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>C46</td>
<td>Warrant of Detention</td>
<td></td>
<td>2</td>
<td></td>
</tr>
</tbody>
</table>

**POLICE FORMS**

**Total Hours Required – 75**

**Police – 37.5**

**Law and Regulation (Policy) – 37.5**

<p>| C47 | Notice of search (unattended vehicle) s.7 CPEO 2014 | Yes - The Ordinance requires this form as part of its provisions | The Police | 1 |
| C48 | Search Record – Person s.10 CPEO 2014 | Yes - The Ordinance requires this form as part of its provisions | The Police | 1 |
| C49 | Search Record – Vehicle s.10 CPEO 2014 | Yes - The Ordinance requires this form as part of its provisions | The Police | 1 |
| C50 | Record of entry and search after arrest s.23 CPEO 2014 | Yes - The Ordinance requires this form as part of its provisions | The Police | 1 |
| C51 | Premises Search Book s.29 CPEO 2014 | Yes - The Ordinance requires this form as part of its provisions | The Police | 1 |
| C52 | Record of Items Seized s.29 CPEO 2014 | Yes - The Ordinance requires this form as part of its provisions | The Police | 1 |
| C53 | Notice of Seizure (s.31) s. 33 CPEO 2014 | Yes - The Ordinance requires this form as part of its provisions | The Police | 1 |
| C54 | Notice of Seizure (s.32) s. 33 CPEO 2014 | Yes - The Ordinance requires this form as part of its provisions | The Police | 1 |
| C55 | Bail Notices (s.51) s.52 CPEO 2014 | Yes - The Ordinance requires this form as part of its provisions | The Police | 1 |
| C56 | Variation of Police Bail Notice s.54 CPEO 2014 | Yes - The Ordinance requires this form as part of its provisions | The Police | 1 |</p>
<table>
<thead>
<tr>
<th>#</th>
<th>Description</th>
<th>Requirement</th>
<th>Issuer</th>
</tr>
</thead>
<tbody>
<tr>
<td>C57</td>
<td>Release on Police Bail Notice s.64 CPEO 2014</td>
<td>Yes - The Ordinance requires this form as part of its provisions</td>
<td>The Police</td>
</tr>
<tr>
<td>C58</td>
<td>Custody Record PART 6</td>
<td>Yes - The Ordinance requires this form as part of its provisions</td>
<td>The Police</td>
</tr>
<tr>
<td></td>
<td></td>
<td>This document requires special consideration as it guards fundamental constitutional rights.</td>
<td></td>
</tr>
<tr>
<td>C59</td>
<td>Simple Caution Form s.127 CPEO 2014</td>
<td>Yes - The Ordinance requires this form as part of its provisions</td>
<td>The Police</td>
</tr>
<tr>
<td>C60</td>
<td>Conditional Caution Forms s.128 CPEO 2014</td>
<td>Yes - The Ordinance requires this form as part of its provisions</td>
<td>The Police</td>
</tr>
</tbody>
</table>

**GUIDANCE DOCUMENTS**

**Total Hours Required – 7.5**

**Law and Regulation (Policy) – 7.5**

<table>
<thead>
<tr>
<th>#</th>
<th>Description</th>
<th>Requirement</th>
<th>Issuer</th>
</tr>
</thead>
<tbody>
<tr>
<td>C61</td>
<td>The Attorney General’s Guidance</td>
<td>Yes - The AGG series is a set of documents, publicly available, that gives guidance on specific topics and makes the process by which the AG reaches decisions transparent. It is important that this guidance is available at commencement as it sets the tone for how the Criminal Justice System will operate.</td>
<td>Law and Regulation</td>
</tr>
</tbody>
</table>

Nearly all the guidance that is to be published at commencement has been drafted but all documents require a final proof read. There are gaps in the series numbers so that other guidance can be slotted in when issued.
<p>| | | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>C62</td>
<td>AGG1</td>
<td>The Attorney General’s Instructions to Prosecutors Framework</td>
<td>Law and Regulation</td>
<td>1</td>
</tr>
<tr>
<td>C63</td>
<td>AGG2</td>
<td>The Attorney General’s Code for Prosecutors</td>
<td>Law and Regulation</td>
<td>1</td>
</tr>
<tr>
<td>C64</td>
<td>AGG5</td>
<td>The Attorney General’s Guidance on Charging</td>
<td>Law and Regulation</td>
<td>1</td>
</tr>
<tr>
<td>C65</td>
<td>AGG10</td>
<td>The Attorney General’s Guidance on Conditional Cautioning</td>
<td>Law and Regulation</td>
<td>1</td>
</tr>
<tr>
<td>C66</td>
<td>AGG11</td>
<td>The Prosecution Manual on Conditional Cautioning</td>
<td>Law and Regulation</td>
<td>1</td>
</tr>
<tr>
<td>C67</td>
<td>AGG15</td>
<td>Prosecution Team File Management Standards</td>
<td>Law and Regulation</td>
<td>1</td>
</tr>
<tr>
<td>C68</td>
<td>AGG20</td>
<td>The Attorney General’s Guidance on Disclosure</td>
<td>Law and Regulation</td>
<td>1</td>
</tr>
<tr>
<td>C69</td>
<td>AGG21</td>
<td>Prosecution Team Disclosure Manual</td>
<td>Law and Regulation</td>
<td>1</td>
</tr>
<tr>
<td>C70</td>
<td>AGG22</td>
<td>Prosecution Team Disclosure Desktop Guide</td>
<td>Law and Regulation</td>
<td>1</td>
</tr>
<tr>
<td>C71</td>
<td>AGG23</td>
<td>The Attorney General’s Joint Disclosure Protocol for Government Departments</td>
<td>Law and Regulation</td>
<td>1</td>
</tr>
<tr>
<td>C72</td>
<td>AGG25</td>
<td>The Attorney General’s Policy on the Care and Treatment of Victims and Witnesses</td>
<td>Law and Regulation</td>
<td>1</td>
</tr>
<tr>
<td>Reference</td>
<td>Title</td>
<td>Category</td>
<td>Rating</td>
<td>Status</td>
</tr>
<tr>
<td>-----------</td>
<td>-----------------------------------------------------------------------</td>
<td>------------------------</td>
<td>--------</td>
<td>---------------</td>
</tr>
<tr>
<td>C73</td>
<td>AGG26 The Attorney General’s Guidance on Victims and Witnesses</td>
<td>Law and Regulation</td>
<td>1</td>
<td>Drafted</td>
</tr>
<tr>
<td>C74</td>
<td>AGG27 The Attorney General’s Guidance on Witness Anonymity</td>
<td>Law and Regulation</td>
<td>1</td>
<td>Drafted</td>
</tr>
<tr>
<td>C75</td>
<td>AGG28 The Attorney General’s Guidance on Applications for Witness Anonymity Orders</td>
<td>Law and Regulation</td>
<td>1</td>
<td>Drafted</td>
</tr>
<tr>
<td>C76</td>
<td>AGG30 The Attorney General’s Guidance on The Acceptance of Pleas and the Prosecutor’s Role in Sentencing</td>
<td>Law and Regulation</td>
<td>1</td>
<td>Drafted</td>
</tr>
<tr>
<td>C77</td>
<td>AGG35 The Attorney General’s Guidance on the Recovery of Prosecution Costs</td>
<td>Law and Regulation</td>
<td>1</td>
<td>Drafted</td>
</tr>
<tr>
<td>C78</td>
<td>AGG40 The Attorney General’s Policy on Prosecuting cases of Domestic Violence</td>
<td>Law and Regulation</td>
<td>1</td>
<td>Drafted</td>
</tr>
<tr>
<td>C79</td>
<td>AGG41 Prosecution Team Domestic Violence Prosecutions Manual</td>
<td>Law and Regulation</td>
<td>1</td>
<td>Drafted</td>
</tr>
<tr>
<td>C80</td>
<td>AGG49 Public Guidance in Relation to Offences of Bribery</td>
<td>Law and Regulation</td>
<td>1</td>
<td>Drafted</td>
</tr>
<tr>
<td>C81</td>
<td>AGG50 The Attorney General’s Guidance to Prosecutors on the Prosecution of Bribery Offences</td>
<td>Law and Regulation</td>
<td>1</td>
<td>Drafted</td>
</tr>
<tr>
<td>C82</td>
<td>AGG55 The Attorney General’s Guidance on the Prosecution of Offences Under the Marriage Ordinance (Armed Services)</td>
<td>Law and Regulation</td>
<td>1</td>
<td>Partly Drafted</td>
</tr>
<tr>
<td>C83</td>
<td>AGG60</td>
<td>The Attorney General’s Guidance on the Prosecution of Offences Committed by Tourists and Other Visitors</td>
<td>Law and Regulation</td>
<td>Drafted</td>
</tr>
<tr>
<td>-----</td>
<td>-------</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>-------------------</td>
<td>---------</td>
</tr>
</tbody>
</table>

**Administrative Actions**

**Total Hours Required – 78**

- **Court** – 37.5
- **Chief Justice** – 3
- **Law and Regulation** – 37.5

<table>
<thead>
<tr>
<th>D1</th>
<th>Recruitment to the Criminal Justice Council</th>
<th>Yes – The CJC is an essential part of developing procedural rules and sentencing guidelines.</th>
<th>Court Chief Justice Law and Regulation</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>D2</td>
<td>Preparation of Agenda for the Criminal Justice Council and circulation of drafted regulations</td>
<td>Yes</td>
<td>Law and Regulation CJC</td>
<td>1</td>
</tr>
<tr>
<td>D3</td>
<td>Briefing of the Chief Justice</td>
<td>Yes</td>
<td>The Attorney General Registrar of the Supreme Court</td>
<td>1</td>
</tr>
<tr>
<td>D4</td>
<td>Identify and appoint trainers to deliver the Training Programme (see below).</td>
<td>Yes</td>
<td></td>
<td>1</td>
</tr>
</tbody>
</table>
TRAINING AND PUBLIC ENGAGEMENT
Total Hours Required (Development of Training Programmes) – 75 Hours Preparation
Total Hours Required (Delivery) – As Set Out Below

JUDICIARY AND COURT STAFF

The Head of Courts and the Senior Magistrate will decide what training court staff and JP’s require and deliver it. All members of the judiciary and court staff will be welcome to attend the local practitioners training programme if they deem it appropriate to do so. All training materials will be shared with the courts and the judiciary.

LOCAL PRACTITIONERS

Training will be offered to local practitioners through the Falkland Islands Legal Community (FILC). Training for practitioners is important because many of the new provisions relating to evidence will be familiar to those who have recently practiced in England and Wales but less so to those who have not. The aim of the training will be to ensure that all practitioners are on an equal footing when the new provisions come into force. The table below sets out broadly the areas for training.

<table>
<thead>
<tr>
<th>No.</th>
<th>Area</th>
<th>Notes</th>
<th>Duration</th>
<th>Provider</th>
</tr>
</thead>
</table>
| E1  | Crimes Ordinance 2014 and Criminal Procedure and Evidence Ordinance 2014 Introduction | Introduction to the Ordinance’s including an overview of:  
- New offences  
- New rules of evidence  
- New ancillary orders  
- Extraterritorial powers | 1 hour | FILC  
Guest speaker  
- The Attorney General |
| E2  | Criminal Procedure and Evidence Ordinance 2014 Police powers | Arrest, detention, adverse inferences from interview, samples, police bail etc.  
- The legal framework  
- How best to represent the individual during a police investigation | 1 hour 30 mins | FILC  
Guest speakers  
- Crown Counsel  
- Member of Deans Court Chambers |
<table>
<thead>
<tr>
<th>No.</th>
<th>AREA</th>
<th>NOTES</th>
<th>DURATION</th>
<th>PROVIDER</th>
</tr>
</thead>
<tbody>
<tr>
<td>E3</td>
<td>Criminal Procedure and Evidence Ordinance 2014</td>
<td>Commencing cases, procedure in court, the criminal procedure rules etc.</td>
<td>1 hour</td>
<td>FILC</td>
</tr>
<tr>
<td></td>
<td>Court Procedure</td>
<td></td>
<td></td>
<td>Guest speakers</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>- Crown Counsel</td>
</tr>
<tr>
<td>E4</td>
<td>Criminal Procedure and Evidence Ordinance 2014</td>
<td>New rules about hearsay and bad character evidence</td>
<td>1 hour 30 mins</td>
<td>FILC</td>
</tr>
<tr>
<td></td>
<td>Hearsay and Bad Character</td>
<td>- The legal framework</td>
<td></td>
<td>Guest speakers</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Opposing bad character applications</td>
<td></td>
<td>- Crown Counsel</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Hearsay</td>
<td></td>
<td>- Member of Deans Court Chambers</td>
</tr>
<tr>
<td>E5</td>
<td>Criminal Procedure and Evidence Ordinance 2014</td>
<td>Special measures, mentally disordered defendants etc.</td>
<td>1 hour</td>
<td>FILC</td>
</tr>
<tr>
<td></td>
<td>Youths and vulnerable persons</td>
<td>- The legal framework</td>
<td></td>
<td>Guest speakers</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Doing the best for children and vulnerable people in the criminal justice system.</td>
<td></td>
<td>- Crown Counsel</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>- Member of Deans Court Chambers</td>
</tr>
</tbody>
</table>

**THE POLICE FORCE**

<table>
<thead>
<tr>
<th>No.</th>
<th>AREA</th>
<th>NOTES</th>
<th>DURATION</th>
<th>PROVIDER</th>
</tr>
</thead>
<tbody>
<tr>
<td>E6</td>
<td>Crimes Ordinance 2014 and Criminal Procedure and Evidence Ordinance 2014</td>
<td>Introduction to the Ordinance’s including an overview of:</td>
<td>1 hour</td>
<td>AG’s Chambers</td>
</tr>
<tr>
<td></td>
<td>Introduction</td>
<td>- New offences</td>
<td></td>
<td>Guest speaker</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- New rules of evidence</td>
<td></td>
<td>- The Attorney General</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- New ancillary orders</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Extraterritorial powers</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| E7 | Criminal Procedure and Evidence Ordinance 2014 PART 2 and 3 – Stop /Enter and Search and Seizure | Police powers in relation to searches and seizure – The Legal Framework  
Best Practice - evidence gathering retention and recording | 1 hour | AG’s Chambers  
Guest speakers  
- Crown Counsel  
- UK Police Trainer |
|---|---|---|---|---|
| E8 | Criminal Procedure and Evidence Ordinance 2014 PART 4, 5 and 6 – Arrest, detention and interview | Police powers of arrest, detention, taking samples and questioning.  
Including adverse inferences from silence – The Legal Framework  
Best practice - how to properly interview suspects | 1 hour | AG’s Chambers  
Guest speakers  
- Crown Counsel  
- UK Police Trainer |
| E9 | Criminal Procedure and Evidence Ordinance 2014 PART 8 – Cautions and Charging | Simple and conditional cautions – The Legal Framework  
Best Practice - Submitting case files to the AG | | AG’s Chambers  
Guest speaker  
- Crown Counsel |
| E10 | Criminal Procedure and Evidence Ordinance 2014 PART 14 – Disclosure | Police duties of disclosure – The Legal Framework  
Best practice – Keeping on top of Disclosure | 1 hour | AG’s Chambers  
Guest speakers  
- Crown Counsel  
- UK Police Trainer |
### PRACTITIONERS TEXT

The Crimes Ordinance 2014 and the Criminal Procedure and Evidence Ordinance 2014 together with the Criminal Procedure Rules will contain the vast majority of the law that criminal practitioners will need to know. The provisions will be referred to regularly and a practitioner’s text, like Archbold in England and Wales, will be of great assistance.

In the first instance the practitioner’s text will set out the legislation and rules without commentary. As the Falkland Islands develops its own body of case law the text can be expanded in future editions as can any commentary. The text will require formatting and arranging for professional printing (assume overseas).
Hardback copies of the text should be produced so that all practitioners and members of court staff and the judiciary can make easy reference to the law by citing page and paragraph numbers in the text. This will also save carrying large lever arch files containing the law for those who cannot access the internet in the court building (assume 12 to 15 copies).

In addition it is possible for a commentary on the legislation to be produced based on the explanatory notes but expanded and making reference to case law. This will be useful for new practitioners, judges, justices of the peace and police officers but is a much larger task and has not been scoped or costed.
AGG49
PUBLIC GUIDANCE
About procedures that businesses can put into place to prevent persons associated with them from committing bribery offences.

ABOUT THIS GUIDANCE

THIS GUIDANCE IS ISSUED IN ACCORDANCE WITH SECTION 498 OF PART 20 OF THE CRIMES ORDINANCE 2014 AND THE PUBLICATION FORMS PART OF THE ATTORNEY GENERAL’S GUIDANCE (AGG) SERIES.
Foreword

Bribery blights lives. Its immediate victims include organisations that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted.

Readers of this document will be aware that the Crimes Ordinance 2014 contains offences of offering or receiving bribes, bribery of foreign public officials and of failure to prevent a bribe being paid on an organisation’s behalf. These are certainly tough rules. But readers should understand too that they are directed at making life difficult for the mavericks responsible for corruption, not unduly burdening the vast majority of decent, law-abiding businesses. This guidance shows that combating the risks of bribery is largely about common sense, not burdensome procedures. The core principle it sets out is proportionality.

Businesses in the Falkland Islands should not see Part 20 of the Ordinance as something new. Bribery has always been a criminal offence. The Legislative Assembly introduced offences of bribery, including extra territorial provisions, when it passed into law the Bribery and Corruption Overseas Ordinance 2006. Part 20 of the Ordinance confirms the law against bribery and brings it up to date.

It is directly beneficial for business because it provides clarity and a level playing field, helping to align commercial operations around decent standards. It also sets out a statutory defence: organisations which have adequate procedures in place to prevent bribery are in a stronger position if isolated incidents have occurred in spite of their efforts. These provisions protect business by making the law absolutely clear and easy to find by consolidating it into one principle Ordinance. This allows business to comply with certainty.
It is not a question of deciding between tackling corruption and supporting growth. Addressing bribery is good for business because it creates the conditions for free markets to flourish. In implementing Part 20 of the Ordinance we are striking a blow for the rule of law and the growth of free trade.

Peter Judge MBE
Attorney General
[]2016
Introduction

Part 20 of the Crime Ordinance 2014 sets out an offence under section 496 which can be committed by commercial organisations which fail to prevent persons associated with them from committing bribery on their behalf. It is a full defence for an organisation to prove that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.

Section 498 of the Ordinance requires the Governor to publish guidance about procedures which commercial organisations can put in place to prevent persons associated with them from bribing. This document sets out that guidance.

The Ordinance contains two general offences covering the offering, promising or giving of a bribe (active bribery) and the requesting, agreeing to receive or accepting of a bribe (passive bribery) at sections 490 and 491 respectively. It also sets out two further offences which specifically address commercial bribery.

Section 495 of the Ordinance creates a third offence relating to bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business, and section 496 deals with corporate liability for failing to prevent bribery on behalf of a commercial organisation.

This guidance explains the policy behind section 496 and is intended to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery as mentioned in section 496. The guidance is designed to be of general application and is formulated around six guiding principles. The guidance is not prescriptive and is not a one-size-fits-all document. The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case.
The onus will remain on the organisation, in any case where it seeks to rely on the defence, to prove that it had adequate procedures in place to prevent bribery. However, departures from the suggested procedures contained within the guidance will not of itself give rise to a presumption that an organisation does not have adequate procedures. The guidance suggests certain procedures, but they may not all be applicable to your circumstances. Sometimes, you may have alternatives in place that are also adequate.

As the principles make clear commercial organisations should consider a risk-aware approach to managing bribery risks. Procedures should be proportionate to the risks faced by an organisation. No policies or procedures are capable of detecting and preventing all bribery. It is important that policies and procedures are regularly reviewed and that staff are trained and aware of the rules.

A risk-aware approach will, however, serve to focus the effort where it is needed and will have most impact. A risk-aware approach recognises that the bribery threat to organisations varies across jurisdictions, business sectors, business partners and transactions.

The language used in this guidance reflects its non-prescriptive nature. The six principles are intended to be of general application and are therefore expressed in neutral but affirmative language.
Corporate Liability

Section 496 of the Crimes Ordinance 2014

The objective of section 496 is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf. So in order to achieve an appropriate balance, the section provides a full defence. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times. However, the defence is also included in order to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.

The application of bribery prevention procedures by commercial organisations is of significant interest to those investigating bribery and is relevant if an organisation wishes to report an incident of bribery to the prosecution authorities. The commercial organisation’s willingness to co-operate with an investigation into an allegation of bribery and to make a full disclosure will also be taken into account in any decision as to whether it is appropriate to commence criminal proceedings.

In order to be liable under section 496 a commercial organisation must have failed to prevent conduct that would amount to the commission of a relevant bribery offence. Where the prosecution cannot prove beyond reasonable doubt that a relevant bribery offence has been committed the section 496 offence will not be triggered.

The section 496 offence is in addition to, and does not displace, liability which might arise under other sections of the Ordinance where the commercial organisation itself commits an offence.
Jurisdiction

Section 501 of the Crimes Ordinance 2014

Section 501 of the Ordinance provides that the courts will have jurisdiction over sections 490, 491 or 495 offences committed in the Falkland Islands, but they will also have jurisdiction over offences committed outside the Falkland Islands where the person committing them has a close connection with the Falkland Islands by virtue of being an individual who was ordinarily resident in the Falkland Islands; or by being a corporate body incorporated by or under the law of or carrying on business in the Falkland Islands.

However, an individual and a commercial organisation can be liable for the specific bribery offences who is neither a Falkland Islands resident nor a body incorporated or formed in the Falkland Islands. It must also be remembered that the common law principle “identification principle” is retained which means that an offence committed by a body corporate is also committed by an individual where that person is the directing mind or will of the organisation such as key directors, shadow directors, controlling shareholders or chief executives.
Offences of Bribing Another Person

Section 490 of the Crimes Ordinance 2014

Section 490 makes it an offence for a person (‘P’) to offer, promise or give a financial or other advantage to another person in one of two cases:

**Case 1** applies where P intends the advantage to bring about the improper performance by another person of a relevant function or activity or to reward such improper performance.

**Case 2** applies where P 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.

‘Improper performance’, in summary, means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. The offence applies to bribery relating to any function of a public nature, connected with a business, performed in the course of a person’s employment or performed on behalf of a company or another body of persons. Therefore, bribery in both the public and private sectors is covered.

For the purposes of deciding whether a function or activity has been performed improperly 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 that function or activity. Where the performance of the function or activity is not subject to Falkland Islands law (for example, it takes place in a jurisdiction outside of the Falkland Islands) than any local custom or practice must be disregarded – unless permitted or required by the written law applicable to that particular country. Written law means any written constitution, provision made by or under legislation applicable to the country concerned or any judicial decision evidenced in published written sources.
By way of illustration, in order to proceed with a case under section 490 based on an allegation that hospitality was intended as a bribe, the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. This would be judged by what a reasonable person in the Falkland Islands thought.

So, for example, an invitation to foreign clients to attend a dinner at the Waterfront Kitchen Cafe as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation’s field is extremely unlikely to engage section 490 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function. Further specific guidance on hospitality is given at page 20.
Bribery of a Foreign Public Official

Section 495 of the Crimes Ordinance 2014

Section 495 sets out the standalone 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. The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so. However, the offence is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage.

A ‘foreign public official’ includes officials, whether elected or appointed, who hold a legislative, administrative or judicial position of any kind of a country or territory outside the UK. It also includes any person who performs public functions in any branch of the national, local or municipal government of such a country or territory or who exercises a public function for any public agency or public enterprise of such a country or territory, such as professionals working for public health agencies and officers exercising public functions in state-owned enterprises. Foreign public officials can also be an official or agent of a public international organisation, such as the UN or the World Bank.

Sections 490 and 495 may capture the same conduct but will do so in different ways. The policy that founds the offence at section 495 is the need to prohibit the influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to others at the official’s request, assent or acquiescence. Such activity is very likely to involve conduct which amounts to ‘improper performance’ of a relevant function or activity to which section 490 applies, but, unlike section 490, section 495 does not require proof of it or an intention to induce it.
This is because the exact nature of the functions of persons regarded as foreign public officials is often very difficult to ascertain with any accuracy, and the securing of evidence will often be reliant on the co-operation of the state any such officials serve. To require the prosecution to rely entirely on section 490 would amount to a very significant deficiency in the ability of the legislation to address this particular mischief.

That said, it is not the Government’s intention to criminalise behaviour where no such mischief occurs, but merely to formulate the offence to take account of the evidential difficulties referred to above. In view of its wide scope, and its role in the new form of corporate liability at section 496, the Government offers the following further explanation of issues arising from the formulation of section 495.

For the purposes of section 495 prosecutors will be required to show not only that an ‘advantage’ was offered, promised or given to the official or to another person at the official’s request, assent or acquiescence, but that the advantage was one that the official was not permitted or required to be influenced by as determined by the written law applicable to the foreign official.

In seeking tenders for publicly funded contracts Governments often permit or require those tendering for the contract to offer, in addition to the principal tender, some kind of additional investment in the local economy or benefit to the local community. Such arrangements could in certain circumstances amount to a financial or other ‘advantage’ to a public official or to another person at the official’s request, assent or acquiescence. Where, however, relevant ‘written law’ permits or requires the official to be influenced by such arrangements they will fall outside the scope of the offence.

So, for example, where local planning law permits community investment or requires a foreign public official to minimise the cost of public procurement administration through cost sharing with contractors, a prospective contractor’s offer of free training is very unlikely to engage section 495. In circumstances where the additional investment would amount to
an advantage to a foreign public official and the local law is silent as to whether the official
is permitted or required to be influenced by it, prosecutors will consider the public interest
in prosecuting. This will provide an appropriate backstop in circumstances where the
evidence suggests that the offer of additional investment is a legitimate part of a tender
exercise.

In addition it is recognised that different jurisdictions have different cultures and different
cultural expectations. For example in China the giving of ‘Lucky Money’ in red envelopes is
an ancient tradition and businesses operating in this market will no doubt wish to respect
this tradition. The giving of money in this way is unlikely to attract investigation and
prosecution unless the amounts involved are unusual or the circumstances suspect.
Hospitality, Promotional, and Other Business Expenditure

Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Ordinance to criminalise such behaviour.

The Government does not intend for the Ordinance to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes. It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes.

In order to amount to a bribe under section 495 there must be an intention for a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage. In this regard, it may be in some circumstances that hospitality or promotional expenditure in the form of travel and accommodation costs does not even amount to ‘a financial or other advantage’ to the relevant official because it is a cost that would otherwise be borne by the relevant foreign Government rather than the official him or herself.

Where the prosecution is able to establish a financial or other advantage has been offered, promised or given, it must then show that there is a sufficient connection between the advantage and the intention to influence and secure business or a business advantage. Where the prosecution cannot prove this to the requisite standard then no offence under section 495 will be committed.
There may be direct evidence to support the existence of this connection and such evidence may indeed relate to relatively modest expenditure. In many cases, however, the question as to whether such a connection can be established will depend on the totality of the evidence which takes into account all of the surrounding circumstances. It would include matters such as the type and level of advantage offered, the manner and form in which the advantage is provided, and the level of influence the particular foreign public official has over awarding the business.

In this circumstantial context, the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return.

The standards or norms applying in a particular sector may also be relevant here. However, simply providing hospitality or promotional, or other similar business expenditure which is commensurate with such norms is not, of itself, evidence that no bribe was paid if there is other evidence to the contrary; particularly if the norms in question are extravagant. Levels of expenditure will not, therefore, be the only consideration in determining whether a section 495 offence has been committed. But in the absence of any further evidence demonstrating the required connection, it is unlikely, for example, that incidental provision of a routine business courtesy will raise the inference that it was intended to have a direct impact on decision making, particularly where such hospitality is commensurate with the reasonable and proportionate norms for the particular industry; e.g. the provision of airport to hotel transfer services to facilitate an on-site visit, or dining and tickets to an event.

Some further examples might be helpful. The provision by a Falkland Islands mining company of reasonable travel and accommodation to allow foreign public officials to visit their distant mining operations so that those officials may be satisfied of the high standard and safety of the company’s installations and operating systems are circumstances that fall outside the intended scope of the offence.
Flights and accommodation to allow foreign public officials to meet with senior executives of a Falkland Islands commercial organisation in New York as a matter of genuine mutual convenience, and some reasonable hospitality for the individual and his or her partner, such as fine dining and attendance at the opera are facts that are, in themselves, unlikely to raise the necessary inferences.

However, if the choice of New York as the most convenient venue was in doubt because the organisation’s senior executives could easily have seen the official with all the relevant documentation when they had visited the relevant country the previous week then the necessary inference might be raised. Similarly, supplementing information provided to a foreign public official on a commercial organisation’s background, track record and expertise in providing private health care with an offer of ordinary travel and lodgings to enable a visit to a hospital run by the commercial organisation is unlikely to engage section 495. On the other hand, the provision by that same commercial organisation of a five-star holiday for the foreign public official which is unrelated to a demonstration of the organisation’s services is, all things being equal, far more likely to raise the necessary inference.

It may be that, as a result of the introduction of the section 496 offence, commercial organisations will review their policies on hospitality and promotional or other similar business expenditure as part of the selection and implementation of bribery prevention procedures, so as to ensure that they are seen to be acting both competitively and fairly. It is, however, for individual organisations, or business representative bodies, to establish and disseminate appropriate standards for hospitality and promotional or other similar expenditure. Prosecutorial discretion is discussed at page 20.
**Failure of Commercial Organisations to Prevent Bribery**

*Section 496 of the Crimes Ordinance 2014*

A 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. As set out above, the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities.

Only a ‘relevant commercial organisation’ can commit an offence under section 496 of the Ordinance. A ‘relevant commercial organisation’ is defined as a body or partnership incorporated or formed in the Falkland Islands irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the Falkland Islands irrespective of the place of incorporation or formation. The key concept here is that of an organisation which ‘carries on a business’. The courts will be the final arbiter as to whether an organisation ‘carries on a business’ in the Falkland Islands taking into account the particular facts in individual cases. However, the following paragraphs set out the Government’s intention as regards the application of the phrase.

As regards bodies incorporated, or partnerships formed, in the Falkland Islands, despite the fact that there are many ways in which a body corporate or a partnership can pursue business objectives, the Government expects that whether such a body or partnership can be said to be carrying on a business will be answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.
As regards bodies incorporated, or partnerships formed, outside the Falkland Islands, whether such bodies can properly be regarded as carrying on a business or part of a business ‘in any part of the Falkland Islands’ will again be answered by applying a common sense approach. Where there is a particular dispute as to whether a business presence in the Falkland Islands satisfies the test in the Ordinance, the final arbiter, in any particular case, will be the courts as set out above.

However, the Government anticipates that applying a common sense approach would mean that organisations that do not have a demonstrable business presence in the Falkland Islands would not be caught.

A commercial organisation is liable under section 496 if a person ‘associated’ with it bribes another person intending to obtain or retain business or a business advantage for the organisation. A person associated with a commercial organisation is defined as a person who ‘performs services’ for or on behalf of the organisation. This person can be an individual or an incorporated or unincorporated body. The capacity in which a person performs services for or on behalf of the organisation does not matter, so employees (who are presumed to be performing services for their employer), agents and subsidiaries are included. The question as to whether a person is performing services for an organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and the organisation. The concept of a person who ‘performs services for or on behalf of’ the organisation is intended to give section 496 broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation’s behalf.

This broad scope means that contractors could be ‘associated’ persons to the extent that they are performing services for or on behalf of a commercial organisation. Also, where a supplier can properly be said to be performing services for a commercial organisation rather than simply acting as the seller of goods, it may also be an ‘associated’ person.
Where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of sub-contractors, an organisation is likely only to exercise control over its relationship with its contractual counterparty. Indeed, the organisation may only know the identity of its contractual counterparty. It is likely that persons who contract with that counterparty will be performing services for the counterparty and not for other persons in the contractual chain.

The principal way in which commercial organisations may decide to approach bribery risks which arise as a result of a supply chain is by employing the types of anti-bribery procedures referred to elsewhere in this guidance (e.g. risk-based due diligence and the use of anti-bribery terms and conditions) in the relationship with their contractual counterparty, and by requesting that counterparty to adopt a similar approach with the next party in the chain.

As for joint ventures, these come in many different forms, sometimes operating through a separate legal entity, but at other times through contractual arrangements. In the case of a joint venture operating through a separate legal entity, a bribe paid by the joint venture entity may lead to liability for a member of the joint venture if the joint venture is performing services for the member and the bribe is paid with the intention of benefiting that member. However, the existence of a joint venture entity will not of itself mean that it is ‘associated’ with any of its members. A bribe paid on behalf of the joint venture entity by one of its employees or agents will therefore not trigger liability for members of the joint venture simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture.

The situation will be different where the joint venture is conducted through a contractual arrangement. The degree of control that a participant has over that arrangement is likely to be one of the ‘relevant circumstances’ that would be taken into account in deciding whether a person who paid a bribe in the conduct of the joint venture business was ‘performing services for or on behalf of’ a participant in that arrangement.
It may be, for example, that an employee of such a participant who has paid a bribe in order to benefit his employer is not to be regarded as a person ‘associated’ with all the other participants in the joint venture. Ordinarily, the employee of a participant will be presumed to be a person performing services for and on behalf of his employer. Likewise, an agent engaged by a participant in a contractual joint venture is likely to be regarded as a person associated with that participant in the absence of evidence that the agent is acting on behalf of the contractual joint venture as a whole.

Even if it can properly be said that an agent, a subsidiary, or another person acting for a member of a joint venture, was performing services for the organisation, an offence will be committed only if that agent, subsidiary or person intended to obtain or retain business or an advantage in the conduct of business for the organisation.

The fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence. Without proof of the required intention, liability will not accrue through simple corporate ownership or investment or through the payment of dividends or provision of loans by a subsidiary to its parent.

So, for example, a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe. By the same token, liability for a parent company could arise where a subsidiary is the ‘person’ which pays a bribe which it intends will result in the parent company obtaining or retaining business or vice versa.
The question of adequacy of bribery prevention procedures will depend in the final analysis on the facts of each case, including matters such as the level of control over the activities of the associated person and the degree of risk that requires mitigation.
Facilitation Payments

Small bribes paid to facilitate routine Government action – otherwise called ‘facilitation payments’ – could trigger either the section 495 offence or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 490 offence and therefore potential liability under section 496.

As was the case under the old law, the Ordinance does not provide any exemption for such payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing ‘culture’ of bribery and have the potential to be abused.

The Government does, however, recognise the problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent. Each case is different but these are important factors that will be taken into consideration when deciding whether it is in the public interest to bring a prosecution.

There is also a need for collaboration between international bodies, governments, the anti-bribery lobby, business representative bodies and sectoral organisations. Businesses themselves also have a role to play and this guidance offers an indication of how the problem may be addressed through the selection of bribery prevention procedures by commercial organisations.
International treaty obligations extend to the Falkland Islands and the Government of the Falkland Islands takes those obligations seriously and is proud to play its part in the global objective to eradicate bribery.

**Duress**

It is recognised that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The common law defence of duress is very likely to be available in such circumstances.

**Prosecutorial Discretion**

Whether to prosecute an offence under the Ordinance is a matter for the prosecuting authorities. In deciding whether to proceed, prosecutors must first decide if there is a sufficiency of evidence, and, if so, whether a prosecution is in the public interest. If the evidential test has been met, prosecutors will consider the general public interest in ensuring that bribery is effectively dealt with. The more serious the offence, the more likely it is that a prosecution will be required in the public interest.

In cases where hospitality, promotional expenditure or facilitation payments do, on their face, trigger the provisions of the Ordinance prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute. The operation of prosecutorial discretion provides a degree of flexibility which is helpful to ensure the just and fair operation of the Ordinance.

The Attorney General has issued detailed guidance to prosecutors in relation to the prosecution of offences under Part 20. Factors that weigh for and against the public interest in prosecuting in the Falkland Islands are referred to in the Attorney General’s Guidance to Prosecutors on the Prosecution of Bribery Offences (AGG50). This guidance can be found on the Attorney General’s web pages at [ ].
Preventing Bribery - The Six Principles

The Government considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles. These are set out below. Commentary and guidance on what procedures the application of the principles may produce accompanies each principle.

These principles are not prescriptive. They are intended to be flexible and outcome focussed, allowing for the huge variety of circumstances that commercial organisations find themselves in. Small organisations will, for example, face different challenges to those faced by large multi-national enterprises. Accordingly, the detail of how organisations might apply these principles, taken as a whole, will vary, but the outcome should always be robust and effective anti-bribery procedures.

As set out in more detail below, bribery prevention procedures should be proportionate to risk. Although commercial organisations with entirely domestic operations may require bribery prevention procedures, we believe that as a general proposition they will face lower risks of bribery on their behalf by associated persons than the risks that operate in foreign markets. In any event procedures put in place to mitigate domestic bribery risks are likely to be similar if not the same as those designed to mitigate those associated with foreign markets.
**Principle 1**

**Proportionate Procedures**

A commercial organisation’s procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation’s activities. They are also clear, practical, accessible, effectively implemented and enforced.

**Commentary**

The term ‘procedures’ is used in this guidance to embrace both bribery prevention policies and the procedures which implement them. Policies articulate a commercial organisation’s anti-bribery stance, show how it will be maintained and help to create an anti-bribery culture. They are therefore a necessary measure in the prevention of bribery, but they will not achieve that objective unless they are properly implemented. Further guidance on implementation is provided through principles 2 to 6.

Adequate bribery prevention procedures ought to be proportionate to the bribery risks that the organisation faces. An initial assessment of risk across the organisation is therefore a necessary first step. To a certain extent the level of risk will be linked to the size of the organisation and the nature and complexity of its business, but size will not be the only determining factor. Some small organisations can face quite significant risks, and will need more extensive procedures than their counterparts facing limited risks. However, small organisations are unlikely to need procedures that are as extensive as those of a large multinational organisation. For example, a very small business may be able to rely heavily on periodic oral briefings to communicate its policies while a large one may need to rely on extensive written communication in addition to briefings and management training and diligence.
The level of risk that organisations face will also vary with the type and nature of the persons associated with it. For example, a commercial organisation that properly assesses that there is no risk of bribery on the part of one of its associated persons will accordingly require nothing in the way of procedures to prevent bribery in the context of that relationship.

By the same token the bribery risks associated with reliance on a third party agent representing a commercial organisation in negotiations with foreign public officials may be assessed as significant and accordingly require much more in the way of procedures to mitigate those risks. Organisations are likely to need to select procedures to cover a broad range of risks but any consideration by a court in an individual case of the adequacy of procedures is likely necessarily to focus on those procedures designed to prevent bribery on the part of the associated person committing the offence in question.

Bribery prevention procedures may be stand alone or form part of wider guidance, for example on recruitment or on managing a tender process in public procurement. Whatever the chosen model, the procedures should seek to ensure there is a practical and realistic means of achieving the organisation’s stated anti-bribery policy objectives across all of the organisation’s functions.

The Government recognises that applying these procedures retrospectively to existing associated persons is more difficult, but this should be done over time, adopting a risk-based approach and with due allowance for what is practicable and the level of control over existing arrangements.

Commercial organisations’ bribery prevention policies are likely to include certain common elements. As an indicative and not exhaustive list, an organisation may wish to cover in its policies:
its commitment to bribery prevention (see Principle 2)
its general approach to mitigation of specific bribery risks, such as those arising from the conduct of intermediaries and agents, or those associated with hospitality and promotional expenditure, facilitation payments or political and charitable donations or contributions; (see Principle 3 on risk assessment)
an overview of its strategy to implement its bribery prevention policies.

The procedures put in place to implement an organisation’s bribery prevention policies should be designed to mitigate identified risks as well as to prevent deliberate unethical conduct on the part of associated persons. The following is an indicative and not exhaustive list of the topics that bribery prevention procedures might embrace depending on the particular risks faced:

- The involvement of the organisation’s top-level management (see Principle 2).
- Risk assessment procedures
- (see Principle 3).
- Due diligence of existing or prospective associated persons (see Principle 4).
- The provision of gifts, hospitality and promotional expenditure; charitable and political donations; or demands for facilitation payments.
- Direct and indirect employment, including recruitment, terms and conditions, disciplinary action and remuneration.
- Governance of business relationships with all other associated persons including pre and post contractual agreements.
- Financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure.
- Transparency of transactions and disclosure of information.
- Decision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest.
- Enforcement, detailing discipline processes and sanctions for breaches of the organisation’s anti-bribery rules.
- The reporting of bribery including ‘speak up’ or ‘whistle blowing’ procedures.
▪ The detail of the process by which the organisation plans to implement its bribery prevention procedures, for example, how its policy will be applied to individual projects and to different parts of the organisation.

▪ The communication of the organisation’s policies and procedures, and training in their application (see Principle 5).

▪ The monitoring, review and evaluation of bribery prevention procedures (see Principle 6).
Principle 2

Leadership

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Commentary

Those at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable. The purpose of this principle is to encourage the involvement of top-level management in the determination of bribery prevention procedures. It is also to encourage top-level involvement in any key decision making relating to bribery risk where that is appropriate for the organisation’s management structure.

Whatever the size, structure or market of a commercial organisation, top-level management commitment to bribery prevention is likely to include (1) communication of the organisation’s anti-bribery stance, and (2) an appropriate degree of involvement in developing bribery prevention procedures.

Internal and external communication of the commitment to zero tolerance to bribery. This could take a variety of forms. A formal statement appropriately communicated can be very effective in establishing an anti-bribery culture within an organisation. Communication might be tailored to different audiences. The statement would probably need to be drawn to people’s attention on a periodic basis and could be generally available, for example on an organisation’s intranet and/or internet site. Effective formal statements that demonstrate top level commitment are likely to include:
- a commitment to carry out business fairly, honestly and openly
- a commitment to zero tolerance towards bribery
- the consequences of breaching the policy for employees and managers
- for other associated persons the consequences of breaching contractual provisions relating to bribery prevention (this could include a reference to avoiding doing business with others who do not commit to doing business without bribery as a ‘best practice’ objective)
- articulation of the business benefits of rejecting bribery (reputational, customer and business partner confidence)
- reference to the range of bribery prevention procedures the commercial organisation has or is putting in place, including any protection and procedures for confidential reporting of bribery (whistle-blowing)
- key individuals and departments involved in the development and implementation of the organisation’s bribery prevention procedures
- reference to the organisation’s involvement in any collective action against bribery in, for example, the same business sector.

Effective leadership in bribery prevention will take a variety of forms appropriate for and proportionate to the organisation’s size, management structure and circumstances. In smaller organisations a proportionate response may require top-level managers to be personally involved in initiating, developing and implementing bribery prevention procedures and bribery critical decision making. In a large multi-national organisation the board should be responsible for setting bribery prevention policies, tasking management to design, operate and monitor bribery prevention procedures, and keeping these policies and procedures under regular review. But whatever the appropriate model, top-level engagement is likely to reflect the following elements:

- Selection and training of senior managers to lead anti-bribery work where appropriate.
- Leadership on key measures such as a code of conduct.
- Endorsement of all bribery prevention related publications.
Leadership in awareness raising and encouraging transparent dialogue throughout the organisation so as to seek to ensure effective dissemination of anti-bribery policies and procedures to employees, subsidiaries, and associated persons, etc.

Engagement with relevant associated persons and external bodies, such as sectoral organisations and the media, to help articulate the organisation’s policies.

Specific involvement in high profile and critical decision making where appropriate.

Assurance of risk assessment.

General oversight of breaches of procedures and the provision of feedback to the board or equivalent, where appropriate, on levels of compliance.
 Principle 3  

Risk Assessment

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Commentary

For many commercial organisations this principle will manifest itself as part of a more general risk assessment carried out in relation to business objectives. For others, its application may produce a more specific stand-alone bribery risk assessment. The purpose of this principle is to promote the adoption of risk assessment procedures that are proportionate to the organisation’s size and structure and to the nature, scale and location of its activities. But whatever approach is adopted the fuller the understanding of the bribery risks an organisation faces the more effective its efforts to prevent bribery are likely to be.

Some aspects of risk assessment involve procedures that fall within the generally accepted meaning of the term ‘due diligence’. The role of due diligence as a risk mitigation tool is separately dealt with under Principle 4.

Risk assessment procedures that enable the commercial organisation accurately to identify and prioritise the risks it faces will, whatever its size, activities, customers or markets, usually reflect a few basic characteristics. These are:

- Oversight of the risk assessment by top level management.
- Appropriate resourcing – this should reflect the scale of the organisation’s business and the need to identify and prioritise all relevant risks.
Identification of the internal and external information sources that will enable risk to be assessed and reviewed.

- Due diligence enquiries (see Principle 4).
- Accurate and appropriate documentation of the risk assessment and its conclusions.

As a commercial organisation’s business evolves, so will the bribery risks it faces and hence so should its risk assessment. For example, the risk assessment that applies to a commercial organisation’s domestic operations might not apply when it enters a new market in a part of the world in which it has not done business before (see Principle 6 for more on this).

Commonly encountered external risks can be categorised into five broad groups – country, sectoral, transaction, business opportunity and business partnership:

- **Country risk**: this is evidenced by perceived high levels of corruption, an absence of effectively implemented anti-bribery legislation and a failure of the foreign government, media, local business community and civil society effectively to promote transparent procurement and investment policies.

- **Sectoral risk**: some sectors are higher risk than others. Higher risk sectors include the extractive industries and the large scale infrastructure sector.

- **Transaction risk**: certain types of transaction give rise to higher risks, for example, charitable or political contributions, licences and permits, and transactions relating to public procurement.

- **Business opportunity risk**: such risks might arise in high value projects or with projects involving many contractors or intermediaries; or with projects which are not apparently undertaken at market prices, or which do not have a clear legitimate objective.

- **Business partnership risk**: certain relationships may involve higher risk, for example, the use of intermediaries in transactions with foreign public officials; consortia or joint venture partners; and relationships with politically exposed persons where the proposed business relationship involves, or is linked to, a prominent public official.
An assessment of external bribery risks is intended to help decide how those risks can be mitigated by procedures governing the relevant operations or business relationships; but a bribery risk assessment should also examine the extent to which internal structures or procedures may themselves add to the level of risk. Commonly encountered internal factors may include:

- deficiencies in employee training, skills and knowledge
- bonus culture that rewards excessive risk taking
- lack of clarity in the organisation’s policies on, and procedures for, hospitality and promotional expenditure, and political or charitable contributions
- lack of clear financial controls
- lack of a clear anti-bribery message from the top-level management.
Principle 4

Due Diligence

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Commentary

Due diligence is firmly established as an element of corporate good governance and it is envisaged that due diligence related to bribery prevention will often form part of a wider due diligence framework. Due diligence procedures are both a form of bribery risk assessment (see Principle 3) and a means of mitigating a risk. By way of illustration, a commercial organisation may identify risks that as a general proposition attach to doing business in reliance upon local third party intermediaries. Due diligence of specific prospective third party intermediaries could significantly mitigate these risks. The significance of the role of due diligence in bribery risk mitigation justifies its inclusion here as a Principle in its own right.

The purpose of this Principle is to encourage commercial organisations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf.

As this guidance emphasises throughout, due diligence procedures should be proportionate to the identified risk. They can also be undertaken internally or by external consultants. A person ‘associated’ with a commercial organisation includes any person performing services for a commercial organisation. The scope of this definition is broad and can embrace a wide range of business relationships. But the appropriate level of due diligence to prevent bribery will vary enormously depending on the risks arising from the particular relationship.
So, for example, the appropriate level of due diligence required by a commercial organisation when contracting for the performance of information technology services may be low, to reflect low risks of bribery on its behalf.

In contrast, an organisation that is selecting an intermediary to assist in establishing a business in foreign markets will typically require a much higher level of due diligence to mitigate the risks of bribery on its behalf.

Organisations will need to take considerable care in entering into certain business relationships, due to the particular circumstances in which the relationships come into existence. An example is where local law or convention dictates the use of local agents in circumstances where it may be difficult for a commercial organisation to extricate itself from a business relationship once established. The importance of thorough due diligence and risk mitigation prior to any commitment are paramount in such circumstances. Another relationship that carries particularly important due diligence implications is a merger of commercial organisations or an acquisition of one by another.

‘Due diligence’ for the purposes of Principle 4 should be conducted using a risk-aware approach in proportion to the anticipated risk. For example, in lower risk situations, commercial organisations may decide that there is no need to conduct much in the way of due diligence. In higher risk situations, due diligence may include conducting direct interrogative enquiries, indirect investigations, or general research on proposed associated persons. Appraisal and continued monitoring of recruited or engaged ‘associated’ persons may also be required, proportionate to the identified risks. Generally, more information is likely to be required from prospective and existing associated persons that are incorporated (e.g. companies) than from individuals. This is because on a basic level more individuals are likely to be involved in the performance of services by a company and the exact nature of the roles of such individuals or other connected bodies may not be immediately obvious.
Accordingly, due diligence may involve direct requests for details on the background, expertise and business experience, of relevant individuals. This information can then be verified through research and the following up of references, etc.

A commercial organisation’s employees are presumed to be persons ‘associated’ with the organisation for the purposes of the Ordinance. The organisation may wish, therefore, to incorporate in its recruitment and human resources procedures an appropriate level of due diligence to mitigate the risks of bribery being undertaken by employees which is proportionate to the risk associated with the post in question. Due diligence is unlikely to be needed in relation to lower risk posts.
Principle 5

Communication and Training

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

Commentary

Communication and training deters bribery by associated persons by enhancing awareness and understanding of a commercial organisation’s procedures and to the organisation’s commitment to their proper application. Making information available assists in more effective monitoring, evaluation and review of bribery prevention procedures. Training provides the knowledge and skills needed to employ the organisation’s procedures and deal with any bribery related problems or issues that may arise.

The content, language and tone of communications for internal consumption may vary from that for external use in response to the different relationship the audience has with the commercial organisation. The nature of communication will vary enormously between commercial organisations in accordance with the different bribery risks faced, the size of the organisation and the scale and nature of its activities.

Internal communications should convey the ‘tone from the top’ but are also likely to focus on the implementation of the organisation’s policies and procedures and the implications for employees. Such communication includes policies on particular areas such as decision making, financial control, hospitality and promotional expenditure, facilitation payments, training, charitable and political donations and penalties for breach of rules and the articulation of management roles at different levels.
Another important aspect of internal communications is the establishment of a secure, confidential and accessible means for internal or external parties to raise concerns about bribery on the part of associated persons, to provide suggestions for improvement of bribery prevention procedures and controls and for requesting advice.

These so called whistle blowing procedures can amount to a very helpful management tool for commercial organisations with diverse operations that may be in many countries. If these procedures are to be effective there must be adequate protection for those reporting concerns.

External communication of bribery prevention policies through a statement or codes of conduct, for example, can reassure existing and prospective associated persons and can act as a deterrent to those intending to bribe on a commercial organisation’s behalf. Such communications can include information on bribery prevention procedures and controls, sanctions, results of internal surveys, rules governing recruitment, procurement and tendering. A commercial organisation may consider it proportionate and appropriate to communicate its anti-bribery policies and commitment to them to a wider audience, such as other organisations in its sector and to sectoral organisations that would fall outside the scope of the range of its associated persons, or to the general public.

Like all procedures training should be proportionate to risk but some training is likely to be effective in firmly establishing an anti-bribery culture whatever the level of risk. Training may take the form of education and awareness raising about the threats posed by bribery in general and in the sector or areas in which the organisation operates in particular, and the various ways it is being addressed.

General training could be mandatory for new employees or for agents (on a weighted risk basis) as part of an induction process, but it should also be tailored to the specific risks associated with specific posts.
Consideration should also be given to tailoring training to the special needs of those involved in any whistle blowing procedures, and higher risk functions such as purchasing, contracting, distribution and marketing, and working in high risk countries. Effective training is continuous, and regularly monitored and evaluated.

It may be appropriate to require associated persons to undergo training. This will be particularly relevant for high risk associated persons. In any event, organisations may wish to encourage associated persons to adopt bribery prevention training.

Nowadays there are many different training formats available. But whatever the format, the training ought to achieve its objective of ensuring that those participating in it develop a firm understanding of what the relevant policies and procedures mean in practice for them.
Principle 6

Monitoring and Review

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Commentary

The bribery risks that a commercial organisation faces may change over time, as may the nature and scale of its activities, so the procedures required to mitigate those risks are also likely to change. Commercial organisations will therefore wish to consider how to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt them where necessary. In addition to regular monitoring, an organisation might want to review its processes in response to other stimuli, for example governmental changes in countries in which they operate, an incident of bribery or negative press reports.

Organisations could also consider formal periodic reviews and reports for top-level management. Organisations could also draw on information on other organisations’ practices, for example relevant trade bodies or regulators might highlight examples of good or bad practice in their publications.

In addition, organisations might wish to consider seeking some form of external verification or assurance of the effectiveness of anti-bribery procedures. Some organisations may be able to apply for certified compliance with one of the independently-verified anti-bribery standards maintained by industrial sector associations or multilateral bodies. However, such certification may not necessarily mean that a commercial organisation’s bribery prevention procedures are ‘adequate’ for all purposes where an offence under section 496 of the Ordinance could be charged.
AGG50
THE ATTORNEY GENERAL’S GUIDANCE TO PROSECUTORS ON THE PROSECUTION OF BRIBERY OFFENCES
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.

Peter Judge MBE
Attorney General
[] 2016
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 [].

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 organisation's 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.

Law and Regulation Directorate
Attorney General’s Chambers
PO Box 587
Stanley
Falkland Islands
FIQQ 1ZZ

This Document is also available online at: []

Document Control


Edition and Issue Date: 1st Edition, []

Ownership and Review: The Attorney General is the document owner for this document and the next scheduled review date is []

Peter Judge MBE
Attorney General