

PENAL CODE (AMENDMENT) BILL 2014
EXPLANATORY MEMORANDUM

The purpose of the Penal Code (Amendment) Bill 2014 is to amend the Penal Code (“the Code”) by inserting a new Part in relation to bribery. The amendment seeks to reform the criminal law of bribery and to provide for a new consolidated scheme of bribery offences. Further, the Bill amends a number of provisions of the Code addressing sexual offences.

Clause 1 sets out the short title and commencement provision of the Bill.

Clause 2 sets out the interpretation provision of the Bill.

Clause 3 deletes sections 78, 79 and 80 of the Code, which address “Official corruption”, “Extortion by public officers” and “Public officers receiving property to show favour” respectively.

Clause 4 inserts Part VA into the Code. Part VA comprises of 20 sections, from section 88A to section 88T.

Section 88A: Interpretation

Section 88A serves a definition section for terms used in Part VA. It defines “Commissioner”, “bribery”, “foreign public official” and “public international organisation”.

Section 88B: Application

This section provides that Part VA applies to public officers.

Section 88C: Function or activity to which bribe relates

This section defines the fields within which bribery can take place, in other words the types of functions or activities that can be improperly performed for the purposes of sections 88F and 88G. The term “relevant function or activity” is used for this purpose.

The purpose of the section is to ensure that the law of bribery applies equally to public and to selected private functions. Accordingly, the functions or activities in question include all functions of a public nature and all activities connected with a business, trade or profession. In addition, the functions or activities include all activities performed either in the course of employment or on behalf of any body of persons: these two categories span the public/private divide. It should be noted that not every defective performance of one of these functions for reward or in the hope of advantage triggers the law of bribery. Subsection (3) outlines that a function or activity is only relevant where there is an expectation that the functions would be carried out in good faith, or impartially or the person performing it is in a position of trust.

Further, subsection (4) provides that the function or activity in question is still a relevant function

or activity even if it has no connection with Montserrat and is not carried out in Montserrat.

Section 88D: Improper performance to which bribe relates

This section sets out the instances where a relevant function or activity is improperly performed. Improper performance arises where performance breaches a relevant expectation. Additionally, an omission can in some circumstances amount to improper performance. Relevant expectation is defined under this section.

Section 88D also addresses the case where a person is no longer engaged in a given function or activity but still carries out acts related to his former function or activity. These acts are treated as done in performance of the function or activity in question.

Section 88E: Expectation test

This section provides that when deciding what is expected of a person performing a function or activity for the purposes of sections 88C and 88D, the test is what a reasonable person in Montserrat would expect of a person performing the relevant function or activity.

Subsection (2) makes it clear that in deciding what a reasonable person in Montserrat would expect in relation to functions or activities the performance of which is not subject to Montserrat laws, local practice and custom must not be taken into account unless such practice or custom is permitted or required by written law. Subsection (3) defines what is meant by “written law” for the purposes of section 88E.

Section 88F: Offences of bribing another person

This section sets out the instances in which a person commits the offence of bribing another person. These include where the person:

- (a) offers, promises or gives a financial or other advantage to another person and he intends the advantage to:
 - (i) induce a third person to perform improperly a relevant function or activity;
 - (ii) encourage a third person to abstain from performing a relevant function; or
 - (iii) reward a third person for the improper performance of a function or activity;or
- (b) offers, promises or gives a financial or other advantage to another person and he knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity

Subsection (2) makes it clear that the advantage can be offered, promised or given by P directly or through someone else.

Section 88G: Offences relating to being bribed

This section defines the offence of bribery as it applies to the recipient or potential recipient of the bribe. A person commits an offence under section 88G if he, among other things, requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly, whether by himself or another person.

Section 88H: Bribery of foreign public officials

This section creates a separate offence of bribery of a foreign public official. Unlike the general bribery offences in sections 88F and 88G, the offence of bribery of a foreign public official only covers the offering, promising or giving of bribes, and not the acceptance of them. The person giving the bribe must intend to influence the recipient in the performance of his functions as a public official, and must intend to obtain or retain business or a business advantage.

Foreign public officials are defined in section 88A to include both government officials and those working for international organisations.

The section specifies the fault element of the offence, i.e., what a person must intend in order to commit the offence.

It has the effect that, in order to commit the offence, a person must intend to influence a foreign public official in the performance of his functions as a public official, including any failure to exercise those functions and any use of his position, even if he does not have authority to use the position in that way.

In order to commit the offence, a person must also intend to obtain or retain business or an advantage in the conduct of business.

The effect of subsection (3) is that “business” includes anything done in the course of a trade or profession.

Section 88I: Failure of commercial organisations to prevent bribery

This section creates the offence of failing to prevent bribery, which can only be committed by a relevant commercial organisation.

“Relevant commercial organisation is defined at subsection (4). Subsection (4) defines “business” includes a trade or profession and includes what is done in the course of a trade or profession.

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

discharge in order to prove the defence is the balance of probabilities.

Subsection (3) provides that “bribery” in the context of this offence relates only to the offering, promising or giving of a bribe contrary to sections 88F and 88H (there is no corresponding offence of failure to prevent the taking of bribes). Applying ordinary principles of criminal law, the reference to offences under section 88F and 88H include being liable for such offences by way of aiding, abetting, counselling or procuring (secondary liability). Subsection (3) also makes clear that there is no need for the prosecution to show that the person who committed the bribery offence has already been successfully prosecuted. The prosecution must, however, show that the person would be guilty of the offence were that person prosecuted under this Act.

Section 88J: Meaning of associated person

This section provides that a person is associated with a relevant commercial organisation for the purposes of section 88I, if a person performs services for, or on behalf of a relevant commercial organisation. It also seeks to ensure that section 88I relates to the actual activities being undertaken by a person at the time rather than a person general position. The section expressly states that a person may be the commercial organisation’s employee, agent or subsidiary, but where a person is an employee, it is to be presumed that a person is performing services for or on behalf of a relevant commercial organisation, unless the contrary is shown.

Section 88K: Guidance about commercial organisations preventing bribery

This section requires the Commissioner of Financial Services to publish guidance on procedures that relevant commercial organisations can put in place to prevent bribery by persons associated with them (subsection (1)). The Commissioner of Financial Services may revise the guidance or publish revised guidance from time to time (subsection (2)). The guidance may be published in such a manner as the Commissioner of Financial Services considers appropriate (subsection (3)).

Section 88L: Consent to prosecution

A prosecution under the Act can only be brought with the consent of the Director of Public Prosecutions.

Section 88M: Penalties

The penalty for an offence committed by an individual under sections 88F, 88G or 88H is punishable either by a fine of \$7,000 or 2 years’ imprisonment or both on summary conviction or a fine of \$30,000 or 3 years’ imprisonment or both on conviction on indictment. Where the offence is committed by a person other than an individual, the penalty is a fine of \$15,000 on summary conviction or a fine of \$100,000 on conviction on indictment. An offence under section 88I offence can only be tried upon indictment and carries a penalty of a \$100,000 fine.

Section 88N: Territorial application of this Part

This section provides that the offences in sections 88F, 88G or 88H are committed in Montserrat if any part of the conduct element takes place in Montserrat.

Section 88O: Defence for certain bribery offences etc.

This section deals with the legitimate functions of the intelligence services or the defence force which may require the use of a financial or other advantage to accomplish the relevant function. The section provides a defence where a person charged with a relevant bribery offence can prove that it was necessary for:

- the proper exercise of any function of one of the intelligence service; or
- the proper exercise of any function of the defence force when engaged in active service.

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

The Governor is required under subsection (2) to ensure that each service has in place arrangements that are satisfactory to the Financial Services Commissioner and are designed to ensure that the conduct of a member of the service that would otherwise amount to a relevant bribery offence is necessary for a purpose set out in subsection (1)(a). A similar requirement is placed on the Governor under subsection (3) to ensure that the defence force has in place arrangements that are satisfactory to the Financial Services Commissioner and are designed to ensure that the conduct of any member of the defence force engaged on active service or a civilian subject to service discipline working in support of military personnel so engaged is necessary for a purpose set out in subsection (1)(b). Under subsection (4), the arrangements must be approved by Cabinet.

Subsection (5) provides that a person's conduct is to be treated as necessary for the purposes of subsection (1)(a) or (b) in circumstances where the person's conduct would otherwise be an offence under section 88G and involves conduct on the part of another person which would amount to an offence under 88F but for the defence in subsection (1). In other words, subsection (5) has the effect that a recipient of a bribe paid by a member of the intelligence service or defence force is covered by the defence in any case where the person offering or paying the bribe is able to rely on the section 88O defence.

Subsection (6) indicates that a "relevant bribery offence" means an offence under section 88F or 88G, including one committed by aiding, abetting, counselling or procuring such an offence, and related inchoate offences. "Relevant bribery offence" does not include a section 88F offence which would also amount to an offence of bribing a foreign public official under 88H.

Section 88P: Offences under sections 88F, 88G and 88H by bodies corporate etc.

This section addresses the commission of an offence under section 88F, 88G or 88H, a body corporate. Where it is proved that the offence by the body corporate is committed with the consent or connivance of a senior officer of the body corporate or person purporting to act as a senior officer, the senior officer or person is guilty of the same offence. Senior officer and director are defined, for the purposes of interpretation of the section.

Section 88Q: Offences under section 88I by partnerships

This section deals with proceedings for an offence under section 88I against partnerships. The proceedings must be brought in the name of the partnership and not the partners. Certain rules of court and statutory provisions which apply to bodies corporate are deemed to apply to partnerships and any fine imposed on the partnership must be paid out of the partnership assets.

Section 88R: Consequential provisions

This section provides for a Schedule which sets out consequential amendments to existing legislation.

Section 88S: Transitional provisions

This section provides that this new Part does not affect any liability, investigation, legal proceeding or penalty for or in respect of an offence which is committed wholly or partly before the Part comes into force, as it relates to the offence. It is however without prejudice to section 71 of the Interpretation Act (No. 12 of 2011).

Section 88T: Conflict between this Part and other law

This section provides that this Part of the Code takes precedence over any other enactment related to bribery which is inconsistent with it, save for Part VI of the Integrity in Public Office Act 2010 (No. 2 of 2010), and sections 62, 66 and 68 of the Elections Act (Cap. 1.04).

Clause 5 inserts Schedule III, which sets out the consequential amendments to existing legislation, including:

- Co-operative Societies Act (No. 4 of 2011),
- Company Management Act (Cap. 11.26),
- Customs (Control and Management) Act (Cap. 17.04),
- Police Act (Cap. 10.01),
- Police Regulations (Cap. 10.01), and
- Public Service Act (Cap. 1.06).

Clause 6 amends section 116 of the Code by deleting the definition of “unlawful sexual intercourse” and inserting a definition of “sexual intercourse”. It also includes a definition of “genitals” and “medically recognized treatment”.

Clause 7 amends section 117 of the Code to refine the provisions relating to the commission of rape. It also inserts a definition of “man” and “woman” for the purposes of section 117.

Clause 8 inserts section 117A into the Act. Section 117A creates the offence of grievous sexual assault. A person (“the accused”) commits grievous sexual assault if he, without consent of the other person (“the complainant”), does any of the following acts:

- (i) penetrates the vagina or anus of the complainant with a body part other than his penis;
- (ii) penetrates the vagina or anus of the complainant with an object manipulated by him, except if penetration is accomplished for medically recognized treatment;
- (iii) places his or her genitals on or into the mouth of the complainant; or
- (iv) places his or her mouth or part of his or her mouth on or in the genitals of the complainant.

Clause 9 amends section 118 of the Code by refining the provisions relating to incest. It also amends the section to extend it to incest by a woman, which was previously addressed under section 119.

Clause 10 deletes section 119 of the Code, which is incorporated into section 118.

Clause 11 extends section 120 of the Code by imposing a penalty on a male or female who engages in sexual intercourse with a girl under thirteen years of age. It also increases the penalty imposed for an attempt to commit the offence from two years to five years imprisonment.

Clause 12 amends section 121 of the Code by increasing the penalty from two years imprisonment to ten years imprisonment and extending the application of the section to a boy under sixteen years of age.

Clause 13 amends section 122 of the Code by extending it to indecent assault on a man, which was previously addressed under section 138.

Clause 14 amends 123 of the Code by increasing the penalty for indecency with a child under thirteen years from two years to five years imprisonment.

Clause 15 amends section 124 of the Code to criminalize the act of permitting a boy or girl under thirteen years of age to use premises for sexual intercourse. It also decreases the penalty imposed from life imprisonment to five years imprisonment.

Clause 16 amends section 125 of the Code to criminalize the act of causing or encouraging prostitution of a boy or girl under sixteen years of age. It also increases the penalty imposed from two years imprisonment to fifteen years imprisonment.

Clauses 17 and 18 amend sections 126 and 127 of the Code to criminalize procurement by threats and procurement by false pretences, whether perpetrated against a male or female. It

also increases the penalties for both offences from two years imprisonment to fifteen years imprisonment.

Clause 19 amends section 128 of the Code to criminalize the act of administering drugs to facilitate sexual intercourse, whether perpetrated against a male or female. It also increases the penalty from two years imprisonment to fifteen years imprisonment.

Clauses 20 and 21 amend sections 129 and 130 of the Code to criminalize the act of causing prostitution of a person and detention of a person in a brothel, whether male or female. It also increases the penalties from two years imprisonment in both instances to ten years imprisonment.

Clause 22 amends section 131 of the Code to by criminalizing the act of living on the earnings of prostitution, whether perpetrated by a male or female. The penalty for an offence under the section is a fine of \$10,000 or five years imprisonment or both the fine and imprisonment.

Clause 23 amends section 132 of the Code by criminalizing the act of exercising control over a prostitute, whether perpetrated by a male or female. The penalty for an offence under the section is a fine of \$10,000 or five years imprisonment or both the fine and imprisonment.

Clause 24 deletes section 133 of the Code, which has been incorporated into section 131.

Clause 25 amends section 134 of the Code by providing for the penalisation of sexual intercourse with a mental defective to apply equally to both male and female perpetrators. It also increases the penalty imposed under section 134 from two years imprisonment to five years imprisonment.

Clause 26 amends section 135 of the Code by increasing the penalty from six months or \$500 to one year or \$5,000 on summary conviction for keeping or managing a brothel.

Clause 27 amends section 136 of the Code by increasing the penalty for letting premises for use as a brothel. The penalty imposed for a first offence is increased from a fine of \$500 or six months imprisonment or both to a fine of \$5,000 or one year imprisonment or both. The penalty imposed for a subsequent offence is increased from a fine of \$2,000 or one year imprisonment or both to a fine of \$10,000 or two years imprisonment or both.

Clause 28 amends section 137 of the Code by refining the provisions relating to the offence of buggery. It increases the penalty from ten years imprisonment to life imprisonment. Further, the amended section 137 incorporates the provisions of paragraph 3 of the Caribbean Territories (Criminal Law) Order 2000, which decriminalizes certain acts of homosexuality.

Clause 29 deletes section 138, which is incorporated into section 122. The revised section 138 addresses bestiality and imposes a penalty of five years imprisonment for the commission of an act of bestiality.

Clause 30 amends Schedule I by deleting from the table of offences and penalties the entries related to sections 119 and 133. The penalties for sexual offences under section 117A are inserted into Schedule I and the existing penalties for sexual offences under sections 118, 120(1), 120(3), 121, 122, 123 to 132 and 134 to 138 are substituted for the revised penalties.

Clause 31 amends Schedule II by adjusting the entries related to the alternative verdicts for sexual offences.

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Honourable Attorney General