

**December 2010**  
**Note on Bribery Act 2010**

**Summary**

The Act will come into force in April 2011. The legislation is complicated as it tries to encompass bribery in all its forms and prevent loopholes. In essence however, it is probably fair to say that, if it 'feels like bribery', it is likely to be caught by the Act.

The Act introduces criminal offences of receiving and of giving bribes (sections 1 and 2) and bribery of a foreign official (section 6). These offences can be carried out by individuals and companies (the body corporate and/or the senior officer) and can be committed directly or via third parties. The maximum penalty for these offences committed by an individual is 10 years imprisonment plus a fine. A company could face unlimited fines.

Even if the offence takes place abroad, the UK courts will have jurisdiction if any part of the offence takes place in the UK or where the party committing the offence has a 'close connection' to the UK

The Act also introduces an offence of a commercial entity failing to prevent bribery (section 7, 8 and 9). The entity will have a defence if it can show that it had in place adequate procedures designed to prevent bribery. The Government has issued draft guidance on this defence, the final version is due to be published early 2011.

The descriptions of bribery in the Act turn on a financial or other advantage which is intended to result in or reward 'improper performance' of a relevant function or activity or the bribe is itself 'improper performance' of 'a relevant function or activity'.

**'Relevant functions or activity'** include all functions of a public nature, all activities connected with a business and any activity performed in the course of a person's employment

**'Improper performance'** is defined as performance or non-performance which **'breaches a relevant expectation'**

**'A relevant expectation'** means a reasonable expectation of a person in the UK that a function is carried out in good faith or impartially or, where someone is in a position of trust, they carry out the function in accordance with that office.

**An Example**

By way of an example, a local councilor who received money from a company seeking to build a new supermarket would be caught because

- He is carrying out a public function
- He is receiving a financial advantage
- A person in the UK would have an expectation that the role be performed impartially

- His behaviour breaches that relevant expectation
- He therefore receives a financial advantage which amounts to improper performance of a relevant function or activity

Going forward all commercial and public-sector organizations would be well advised to prohibit bribery in any form whether direct or indirect and by or for the organization and commit to implementing systems to counter bribery.

### **The Detail**

#### ***Bribing other People***

Section 1 makes it an offence for a person (P) himself or via another to offer, promise or give a financial advantage / or other advantage to another person where either

- the intention is to bring about or reward improper performance of a relevant function or activity ; or
- P knows or believes it acceptance is itself the improper performance of a relevant function or activity

#### ***Being bribed***

Section 2 makes it an offence for a recipient ( R ) on his own behalf or via a third party to request, agree to receive or accept a financial or other advantage for himself or another where either

- the act itself amounts to the 'improper performance of a relevant function or activity' (whether or not R thinks it is)
- or
- R intends the 'improper performance of a relevant function or activity' (either by R or another) to follow as a consequence or
  - The advantage is a reward for the improper performance by R or another ( whether or not R believes the 'performance of the relevant function or activity is improper')

It is also an offence where the relevant function or activity is "improperly performed" by R (or another person, where R requests, assents to or acquiesces in it) in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage.

**'Relevant functions or activity'** are defined by s 3 of the Act and include

- All functions of a public nature.
- All activities connected with a business (which includes a trade or profession (*section 3(7)*)).

- Any activity performed in the course of a person's employment

**One or more of the following Conditions must also apply;**

Condition A is that a person performing the function or activity is expected to perform it in good faith.

Condition B is that a person performing the function or activity is expected to perform it impartially.

Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.

**'Improper performance'** is defined by Section 4 of the act as performance or non-performance which **'breaches a relevant expectation'**

**'A relevant expectation'** is the expectation referred to in the Conditions above

Section 5 provides that the test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned. This is so, even where the performance of the function or activity is not subject to the law of any part of the United Kingdom (and any local custom or practice will be disregarded unless that custom or practice is permitted or required by the written law applicable to the country or territory concerned).

***Bribing a Foreign official***

Section 6(1) creates a separate offence of bribing a foreign official where directly or through a third party, P offers, promises or gives any financial or other advantage to F, or to another person at F's request or with F's assent or acquiescence, and F is neither permitted nor required **by the written law applicable** to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift

**And** it is P's intention to

- Influence F in F's capacity as a foreign public official ; and
- To obtain or retain business, or an advantage in the conduct of business.

***Failure of commercial organizations to prevent bribery and the adequate procedures defence (sections 7, 8 and 9)***

Section 7(1) provides that a relevant commercial organisation (C) is guilty of an offence if a person associated with C bribes (within the meaning of sections 1 and 6) another person, intending to obtain or retain business or a business advantage for C. The offence can be committed in the UK or overseas.

If A is an employee, it will be presumed (unless the contrary is shown) that A is a person who performs services for or on behalf of C.

Under section 7(2) C has a defence if it can show that it had in place **adequate procedures** designed to prevent bribery. The government has issued draft guidance around the Section 7 defence and put it out to consultation which closed on 8 November 2010. Final guidance is due to be published early 2011 and the expectation is that it will not be very different from the current draft.

The current draft can be accessed via <http://www.justice.gov.uk/consultations/briberyactconsultation.htm> . It sets out 6 principles for bribery prevention as follows;

- Risk Assessment
- Top Level Commitment
- Due diligence around who the organisation does business with and how.
- Clear practical and accessible policies and procedures
- Effective implementation - comms, training etc
- Monitoring and review

#### **Liability**

Section 14 provides that, if the offence under sections 1, 2 and 6 is proved to have been committed with the consent or connivance of a senior officer of a body corporate or Scottish partnership, or a person purporting to act in such a capacity, the senior officer (as well as the body corporate or the Scottish partnership) is guilty of the offence. Senior officer is defined widely and includes not only directors but senior managers and the company secretary.

#### **Section 11 provides for the following penalties.**

An individual guilty of an offence under **sections 1, 2 or 6** is liable:

- On summary conviction, to imprisonment for a maximum term of 12 months (six months in Northern Ireland), or to a fine not exceeding the statutory maximum, currently £5000 or both.
- On conviction on indictment, to imprisonment for a maximum term of ten years, or to a fine, or both

Any other person (for example, a company ) guilty of an offence under section 1, 2 or 6 is liable:

- On summary conviction, to a fine not exceeding the statutory maximum.
- On conviction on indictment, to a fine

A party guilty of an offence under **section 7** is liable on conviction on indictment to a fine.

The courts have jurisdiction in respect of section 1,2 and 6 if any part of the offence takes place in the UK or where the party committing the offence has a 'close connection' to the UK .

The courts have jurisdiction in respect of section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.

Section 10 provides that a prosecution in England and Wales will require the consent of one of the three senior prosecuting authorities:

- The Director of Public Prosecutions.
- The Director of the Serious Fraud Office
- The Director of Revenue and Customs Prosecutions.

A prosecution in Northern Ireland will require the consent of the Director of Public Prosecutions for Northern Ireland or the Director of the Serious Fraud Office.

The draft guidance on Section 9 states that before prosecuting, the authorities will need to consider the weight of evidence and the public interest.

### **Some practical steps**

For business, a key concern will no doubt be the offence of failing to prevent bribery and being able to establish a defence that it has in place adequate procedures designed to prevent bribery.

As it is expected that the final guidance on the Section 7 defence will not differ very much from the current draft, businesses will be well advised to study the guidance carefully and carry out a risk assessment and due diligence and then consider what might need to be put in place (e.g. a Policy and a Code of Conduct covering the company and its dealings with other businesses, procedures and personnel for identifying, reporting and monitoring potential bribery)

On the website of the Department of Business, Innovation and Skills there are links to some very useful practical guidance. In particular, the government sponsored web site on managing the risks of international corruption has examples of a policy and code of conduct as well as plenty of practical advice and checklists. This is found at <http://www.business-anti-corruption.com/about-this-portal/>

Transparency International publishes guidance including a very comprehensive check list on steps to establish the adequate procedures defence <http://www.transparency.org.uk/>