



**Briefing 11/32 July 2011**

# Bribery Act 2010

To: All contacts in England, Wales, Scotland and Northern Ireland

## Key issues

New offences created to replace previous bribery crimes

Both the private and public sectors are covered

Hospitality is not prohibited under the Act

Councils and other providers need to have clear and understood policies in place

## 1. Introduction

The Bribery Act 2010 (c. 23) received Royal Assent on 8 April 2010. The implementation date is 1<sup>st</sup> July 2011. The purpose of the Act is to reform the criminal law of bribery to provide for a new consolidated scheme of bribery offences to cover bribery both in the United Kingdom (UK) and abroad. The Act extends to England and Wales, Scotland and Northern Ireland.

The Act replaces the offences at common law and under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 (known collectively as the Prevention of Corruption Acts 1889 to 1916 and which will be repealed: see Schedule 2) with two general offences.

The first covers the offering, promising or giving of an advantage (broadly, offences of bribing another person). The second deals with the requesting, agreeing to receive or accepting of an advantage (broadly, offences of being bribed). The formulation of these two offences abandons the agent/principal relationship on which the previous law was based in favour of a model based on an intention to induce improper conduct.

## 2. Main points of the Act

Previous legislation is replaced by the offence of offering, promising or giving of an advantage (offences of bribing another person) and by the offence of requesting, agreeing to receive or accepting of an advantage (broadly, offences of being bribed).

The Act also creates a discrete offence of bribery of a foreign public official and a new offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf. It will be a defence if the organisation has "adequate procedures" in place to prevent bribery.

Other main provisions of the Act include:

- a maximum penalty for individuals of 10 years imprisonment for all the offences, except the offence relating to commercial organisations, which will carry an unlimited fine;
- replacing the requirement for the Attorney General's consent to prosecute a bribery offence with a requirement that the offences in the Act may only be instituted by, or with the consent of, the Director of the relevant prosecuting authority;
- extra-territorial jurisdiction to prosecute bribery committed abroad by persons ordinarily resident in the UK as well as UK nationals and UK corporate bodies;
- a defence for conduct that would constitute a bribery offence where the conduct was necessary for the proper exercise of any function of the intelligence services or the armed forces engaged on active service;
- liability to employers in respect of "associated persons", resulting in potential criminal exposure for the acts of consultants, agents or subsidiaries as well as employees.

### **3. What is covered by the Act**

The Act is concerned with bribery. Very generally, this is defined as giving someone a financial or other advantage to encourage that person to perform their functions or activities improperly or to reward that person for having already done so. So this could cover seeking to influence a decision-maker by giving some kind of extra benefit to that decision maker rather than by what can legitimately be offered as part of a tender process.

The Act is not concerned with fraud, theft, books and record offences, Companies Act offences, money laundering offences or competition law.

### **4. Guidance on 'adequate procedures'**

The Ministry of Justice has issued guidance on having 'adequate procedures' in place and these can be found in full at [www.justice.gov.uk/guidance/bribery.htm](http://www.justice.gov.uk/guidance/bribery.htm).

The following is a short excerpt from the guidance.

*"What do I need to do to rely on the defence?"*

*The following six principles will help you decide what, if anything, you need to do differently:*

#### **1 Proportionality:**

*The action you take should be proportionate to the risks you face and to the size of your business. So you might need to do more to prevent bribery if your organisation is large, or if you are operating in an overseas market where bribery is known to be commonplace, compared to what you might do if your organisation is small, or is operating in markets where bribery is not prevalent.*

#### **2 Top Level Commitment:**

*Those at the top of an organisation are in the best position to ensure their organisation conducts business without bribery. If you are running a business, you will want to show that you have been active in making sure that your staff (including any middle management) and the key people who do business with you and for you understand that you do not tolerate bribery. You may also want to get personally involved in taking the necessary proportionate action to address any bribery risks.*

#### **3 Risk Assessment:**

*Think about the bribery risks you might face. For example, you might want to do some research into the markets you operate in and the people you deal with, especially if you are entering into new business arrangements and new markets overseas ('How do I assess risk', see page 5).*

#### **4 Due Diligence:**

*Knowing exactly who you are dealing with can help to protect your organisation from taking on people who might be less than trustworthy. You may therefore want to ask a few questions and do a few checks before engaging others to represent you in business dealings.*

#### **5 Communication:**

*Communicating your policies and procedures to staff and to others who will perform services for you enhances awareness and helps to deter bribery by making clear the basis on which your organisation does business. You may, therefore, want to think about whether additional training or awareness raising would be appropriate or proportionate to the size and type of your business.*

#### **6 Monitoring and Review:**

*The risks you face and the effectiveness of your procedures may change over time. You may want, therefore, to keep an eye on the anti-bribery steps you have taken so that they keep pace with any changes in the bribery risks you face when, for example, you enter new markets.*

#### How do I assess risk?

*Many organisations will face little or no risk of bribery, especially if their business is undertaken primarily in the UK. If you operate overseas, the risks may be higher. Factors such as the particular country you want to do business in, the sector which you are dealing in, the value and duration of your project, the kind of business you want to do and the people you engage to do your business will all be relevant. There are simple practical steps you can take to assess and mitigate risks. These are mostly obvious, and are similar to (or even the same as) those you probably take anyway (for example, to make sure you can trust the people you work with). For example, you might use simple internet searches to find out about the levels of corruption or bribery in the particular country you propose to do business in*

#### Do I need complex procedures in place even if there is no risk?

*No. If there is very little risk of bribery being committed on behalf of your organisation then you may not feel the need for any procedures to prevent bribery. If, having assessed the position, there is a risk of bribery then, if you want to rely on the defence, the procedures you adopt should be proportionate to that risk. There is no need for extensive written documentation or policies. You may already have proportionate procedures through existing controls over company expenditure, accounting and commercial or agent contracts for example. In larger organisations it will be important to ensure that management in charge of the day to day business is fully aware and committed to the objective of preventing bribery. In micro-businesses it may be enough for simple oral reminders to key staff about the organisation's anti-bribery policies. In addition, although parties to a contract are of course free to agree whatever terms are appropriate, the Act does not require you to comply with the anti-bribery procedures of your business partners in order to be able to rely on the defence.*

#### Do I need to do due diligence on all my suppliers?

*You only have to think about doing due diligence on persons who will actually perform services for you, or on your behalf. Someone who simply supplies goods to you is unlikely to do that. It is very unlikely, therefore, that you will need to consider doing due diligence on persons further down a supply chain.*

*Where you decide to undertake due diligence, how much you need to do will depend on your risk assessment. If you assess the risk as low then all you may need to do is satisfy yourself that people performing services for you (for example, an agent) are genuine and someone you can trust to do your business without bribing. You could do this by making enquiries with business contacts, local chambers of commerce or business associations or via the internet for example.*

*Where you think the risks are higher, then you may need to do more. You might ask your agent for a CV, financial statements or accounts, and other references. You might then follow those up to ensure they are genuine. The aim is to satisfy yourself that the person that is to represent your organisation can be trusted not to use bribery on your behalf, but this does not necessarily require sophisticated and costly techniques. Personal contact, allowing you to assess the person for yourself, can be very helpful.*

*Do I need to employ consultants or lawyers to provide advice on the risks I face, the procedures I adopt, or the level of due diligence I should undertake?*

*No. There is no duty to engage lawyers or consultants in helping you assess what risks you face, what procedures you might adopt or what sort of due diligence you undertake - especially where you consider the risks to be low or non-existent. The Act does not require external verification of any bribery prevention measures you have put in place."*

The Ministry of Justice guidance is not prescriptive in nature, but is intended to allow organisations to develop procedures which are appropriate for their own circumstances and the sectors in which they operate.

Other relevant points from the guidance include:-

- the Senior Management Team or Board of Directors having overall responsibility of designing and implementing an anti-corruption program and establishing an anti-corruption culture, with a senior officer being directly accountable for the implementation and running of the program;
- organisations incorporating anti-corruption elements into their code of conduct, risk management, due diligence, decision making, procurement and contract management, employee vetting and disciplinary procedures. The organisation must ensure relevant staff are appropriately trained in these areas;
- organisations should establish gifts and hospitality policies and registers;
- organisations should establish 'whistle blowing' procedures and properly investigate all allegations.

## **5. Comment**

As with all relevant legislation local authorities and all related public service providers must be aware of how they may become victims of events which the legislation is trying to stop as well as ensuring their officers and councillors do not end up perpetrating crimes as defined by the law.

It goes without saying that all public service providers are committed to conducting their activities with the utmost integrity and that no form of bribery or corruption will be tolerated. However we have seen from recent past events, such as bid rigging within the construction sector, that organisations within the public sector can find themselves victims of illegal practices as any organisation can. As a result they need to have in place policies which clearly state the actions to be taken if they find themselves impacted by the crime of bribery. An example might be the path the organisation will follow if a contract is awarded which is

subsequently found to have been awarded following bribery between contractors prior to or during the procurement process.

Equally there are some individuals who will seek to influence the decisions of public sector providers by trying to bribe officers or councillors. Most organisations have procedures in place which identify such activities but these must be seen to be transparent and well understood by all officers and councillors.

It is important for financial procedures to be appropriate and they should include items such as clear policies and processes for the management and recording of financial transactions; appropriate financial controls and separation of duties; internal and external audits which include anti-bribery checks; controls on treasury and banking transactions; and processes for authorising and monitoring employees' and intermediaries' expenses. Procurement policies and procedures must include clear anti-bribery and corruption safeguards and it is understood that inducements in cash or in kind that could influence procurement decisions are unacceptable.

The organisation should be seen to be publishing and communicating its anti-bribery and corruption policies to its suppliers, customers, partners and the public in general and in the case of suppliers and contractors it should obtain their commitment to follow equivalent principles.

HR policies should include relevant policies such as disciplinary processes being in place to support anti-bribery and corruption policies; processes to deal with cases of actual or suspected bribery and rules for when to report to the authorities; monitoring of anti-bribery controls should be extended to joint ventures and significant investment projects.

The liability to employers in respect of "associated persons" such as consultants, agents or subsidiaries means it would be good practice to include a note specifying prohibition on any activity which can be construed as bribery as part of contracts of engagement when consultants or similar are hired.

The introduction of this legislation is a good opportunity for councils and other public services providers to update and re-issue guidance in this area and make sure all officers and councillors have adequate training in what is expected of them both in terms of accepting gifts, corporate hospitality and the like and in looking out for possible illegal activity amongst external contractors and suppliers. This should not be a one off exercise – reviews and monitoring of anti-corruption policies should be built into a regular cycle of checking all policies and procedures.

Most local authorities and public service providers will already have sufficient anti-corruption procedures in place as a matter of good practice, but the Bribery Act will criminalise an organisation's failure to prevent bribery and it is therefore vital that procedures are reviewed especially bearing in mind that a defence for the new offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf, will be that the organisation has "adequate procedures" in place to prevent bribery. If adequate anti-corruption procedures are established, the organisation is likely to escape liability for any corrupt activities carried out by those working on its behalf.

Local authorities must assess the risk they are at when deciding what scale of resources they should allocate to addressing this issue but it would be unacceptable for them to expect that they are at no risk purely because they are a public body.

The risk may not only come from a contractor with whom the organisation has a relationship, or might expect to have one in future. Consultants and agents may also commit acts of bribery.

Corporate hospitality (in a range of formats) is a regular feature of commercial business and a justified part of building relationships with customers from the private and public sectors. Common sense should prevail in all cases and, for example, it would be naive in the extreme for officers or councillors to accept hospitality from a company who are in the process of bidding for a contract. The introduction of thresholds over which approval is required for gifts and hospitality are acceptable might also be considered.

Guidance accompanying the legislation notes that firms must go through a process of understanding what the Act means and what it entails. It will be a bit of a grey area for a while, until the courts have started interpreting and applying the test. However, for anyone who is involved in negotiating deals and contracts with public officials, hospitality must be proportionate. It goes on to say that it may be acceptable to take a client for a meal at the local restaurant, but disproportionately lavish gifts may be considered an offence under the new Act.

As is the case with all legislation, it is far more expensive to go through legal process after a crime has been committed or than to eliminate the chance of it occurring in the first place. Public service providers will be fully aware of the impacts of that in the current financial climate.

### **Useful Links**

Bribery Act 2010 and Explanatory Notes  
<http://www.legislation.gov.uk/ukpga/2010/23/contents>

Guidance under section 9 about commercial organisations preventing bribery  
<http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm>

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