

# The Bribery Act 2010

January 2012



## Background

The Bribery Act 2010 (the "Act") came into force on 1st July 2011 and follows in the wake of the UK's slippage to 17th position, behind Japan, Hong Kong and Austria in the 2009 international "corruption perceptions index" as produced by Transparency International. The Act is effectively the culmination of the implementation of the UK's obligations under the Organisation for Economic Cooperation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials which was ratified by the UK in 1997. Notwithstanding the fact that the Act comes some 13 years later, the changes it has brought present clear and immediate organisational challenges for businesses operating both domestically and internationally.



## The Offences

The Act codifies the existing law on bribery and has introduced a new corporate offence. The offences are as follows:

1. Offering a bribe to another person;
2. Accepting or soliciting a bribe;
3. Bribery of foreign public officials; and
4. Failure of a commercial organisation to prevent bribery (the "Corporate Offence").

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The first three offences are largely self-explanatory and cover the act of bribery, receipt of a bribe and bribery of foreign public officials. However, it is likely that the Corporate Offence will be of most interest to employers. A commercial company or a partnership will be guilty of this offence if an associated person (including an employee, agent or subsidiary providing services for the organisation) bribes another person intending to obtain or retain business for the organisation, or to obtain or retain an advantage in the conduct of business for the organisation. The Corporate Offence, is committed "irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere."

The extraterritorial reach of the Act is wide and has important implications, particularly in relation to the Corporate Offence. A business, even if based entirely in the UK, may be held responsible for the acts of its foreign associated persons. Similarly, organisations incorporated elsewhere but carrying on business in the UK or employing UK citizens cannot assume that they will fall beyond the reach of the Act.

## The Penalties

An individual guilty of one of the first three offences is liable to a maximum of 10 years' imprisonment and/or an unlimited fine. A Commercial organisation convicted of the Corporate Offence will be subject to an unlimited fine.

## The Defence

The Corporate Offence is a strict liability offence. However, there is some light at the end of the tunnel for businesses, as the Act provides for a defence whereby a company may escape liability if it can show that it had "adequate procedures" in place designed to prevent those persons performing services on its behalf from committing bribery. If it is proven that a bribe was paid on a company's behalf with the intention to obtain or retain business for the company, an offence will have been committed for which the company will be liable, subject to the "adequate procedures" defence. Where an organisation might be liable because an associated person has committed a relevant offence, the sole defence available to the organisation will be for it to show that it had in place "adequate procedures" to prevent bribery. The Act, therefore, places the onus on organisations to ensure that their own procedures (and where necessary those of their associated persons) are adequate.

## Governmental Guidance

On 30<sup>th</sup> March 2011 the Ministry of Justice published much anticipated guidance (the "MOJ Guidance") on the scope and impact of the Act. The MOJ Guidance centres on the procedures which commercial organisations can put in place to prevent persons associated with them from giving bribes.

The MOJ Guidance states the six principles which should be borne in mind when implementing policies and procedures to deal with liability arising under the Act:

1. **Proportionate Procedures:** Procedures should be proportionate to the bribery risks faced by an organisation. These should be ascertained by a risk assessment and will depend on a number of factors such as the size, nature and complexity of the business and the type and nature of persons associated with it.

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2. **Top-Level Commitment:** A firm's board of directors (or similar body) should take responsibility for establishing an anti-corruption culture and programme. A senior officer/owner should be responsible for overseeing the anti-corruption programme.
3. **Risk Assessment:** Organisations should assess the nature and extent of their exposure to external and internal risks of bribery being carried out on their behalf by associated persons. Risk assessments should be conducted regularly and should be clearly documented.
4. **Due Diligence:** Organisations should conduct due diligence, taking a proportionate and risk based approach, in respect of present and potential service providers.
5. **Communication (Including Training):** Policies and procedures should be embedded and understood throughout the organisation through internal and external communication, including training that is proportionate to the risks it faces.
6. **Monitoring and Review:** as bribery risks change from time to time, policies and procedures should be kept under constant review and should be updated or amended as necessary.

Organisations should ensure they have the necessary resources available to implement such procedures and it appears that it will not be sufficient for large commercial organisations to simply produce written policies and compliance programmes without supporting them through effective implementation and thorough record keeping.

## Specific Issues for Employers

The Act does not change the disciplinary processes that an employer is required to follow in the investigation of any alleged act of corruption before the imposition of a disciplinary sanction. Employers should continue to follow their own procedures or rely on the statutory disciplinary and grievance procedures. However, in reviewing their disciplinary, grievance and whistleblowing policies and employee handbooks, employers should have a sharp eye for aspects of their business which may raise a bribery or corruption risk and should implement appropriate policies and procedures where necessary.

Managers should be aware of the corporate responsibility to prevent bribery and how associated risks can be mitigated. Training will likely be key in establishing an encompassing anti-bribery culture. Staff should be trained to identify bribery and risk areas to the business and should be familiar with relevant policies and procedures and how they operate to ensure that bribery does not take place within their organisation. New recruits should also be aware of anti-bribery policies and procedures.

Employers should have a clear policy on hospitality, including the giving and receiving of gifts and may wish to operate a blanket ban on employees giving or accepting gifts or to establish appropriate thresholds and reporting procedures.

## Conclusion

The MOJ Guidance is framed in broad terms and should be considered only as a starting point. No prescriptive set of policies and procedures has been issued and it may be difficult particularly for small and medium sized organisations to ascertain with any certainty the efficacy of the anti-bribery policies and procedures which they may chose to implement. However, it is crucial that organisations assess the risks faced by them and, if they have not done so already, that they move immediately to

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implement adequate procedures to prevent bribery and to establish an operating culture which mitigates any risk of bribery taking place.

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