



THE BRIBERY BILL 2010 – AN OVERVIEW

This article provides an overview of the Government's recent strategy to fight bribery and corruption, particularly overseas corruption. The article analyses a centre-plank of that strategy, the Bribery Bill 2010 as well as other developments in the criminal law.

Introduction

1. In the past few years the Government has made considerable advances in combating corruption, particularly corruption overseas. This has led to an apparent increase in investigations and prosecution. Investigations and prosecutions are likely to increase with the enactment of the Bribery Bill [expected in Spring 2010 irrespective of which party is in government due to cross-party support] and the teething period where organisations that are unused to dealing with the criminal justice process become caught up in it.
2. Confirmation of the government's recent intentions can be found in the following examples:
 - Jack Straw appointed as Anti-Corruption Champion,
 - The Cabinet Office drawing together various criminal, civil and non-legal measures against corruption,
 - Keith McCarthy appointed as head of the Serious Fraud Office [SFO] Bribery and Corruption unit which has become the reporting centre for all of the government – there are a number of active investigations,
 - The Financial Services Authority [FSA] taking action against bribery and corruption,
 - A City of London Police Unit to deal with bribery and corruption which has a number of active investigations,
 - A Foreign Bribery Strategy to tackle money laundering by politically exposed persons (PEPs),

- The extension of compulsory powers of production and interview to cover offences of bribery and corruption,
- The increased use of civil powers to recover the proceeds of crime,
- The use of ancillary orders such as Financial Reporting Orders and Serious Crime Prevention Orders,
- The Law Commission report that has led to the proposed Bill.

We will consider some of these matters in more detail below. Many of the new powers are unfamiliar even to criminal practitioners.

The current position

3. The fact of impending bribery legislation has overshadowed the fact that there is existing legislation with real teeth which has been effectively used in the investigations and/or prosecution of:

- BAE
- Prosecution of Mabey & Johnson whose self-reported offences of overseas corruption leading to fines, reparation payments and compliance monitoring,
- The £5.25m fine by the Financial Services Authority (FSA) imposed on Aon Limited (Aon Ltd) for failing to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption associated with making payments to overseas firms and individuals,
- Prosecution of councillor for taking of a bribe to permit a planning application,
- Ikea bribery case in 2007
- Landmark case of the bribing Ugandan official.

4. In summary, the current law is to be found in different sources:

- i) A common law offence [*ie not created by Statute*] is generally perceived to be *the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.*
- ii) Public Bodies Corrupt Practices Act 1889 - bribery of members, officers and servants of public bodies and related to gift, loan, fee, reward or advantage,

- iii) Prevention of Corruption Act 1906 - extends to bribery of 'agents' irrespective of whether the agent is employed or serving in the public or the private sector and related to some "gift or consideration",
 - iv) Prevention of Corruption Act 1916 – provided certain assumptions, increased sentence to 7 years' imprisonment and changed interpretation,
 - v) Anti-terrorism, Crime and Security Act 2001 extended jurisdiction to acts of bribery committed abroad by UK nationals or bodies incorporated under UK law. This is a very unusual power as crimes committed by UK citizens abroad are usually not prosecutable in the UK with rare exceptions such as murder and particular sexual offences. This led to the landmark prosecution of a businessman bribing a Ugandan official.
5. Notwithstanding the prosecutions referred to above, the existing legislation has been the subject of considerable criticism. The Organisation for Economic Co-operation and Development ("OECD") said: [there is] a lack of clarity among the different legislative and regulatory instruments in placeThe current substantive law governing bribery in the UK is characterised by complexity and uncertainty'. Our most recently constituted Law Commission panel stated that the law is quite simply, "riddled with uncertainty and in need of rationalisation."

The new offence as currently drafted

6. The proposal is that new law will replace the existing law with:
- i) two general offences of bribery
 - a. ie the person doing the bribing [known as P] – the offence can be committed in one of two ways
 - b. and the person being bribed [known as R] – the offence can be committed in one of four ways,
 - ii) one specific offence of bribing a foreign public official,
 - iii) a new corporate offence of failing to prevent bribery by an employee or agent.
7. The sentence will be up to 10 years' imprisonment.
8. The Bill proposes that senior management may be personally liable if the corporate entity commits an offence.

9. The existing law of assisting, encouraging etc offences will also cover these new offences.

The general offences

10. After lengthy consultation, it was agreed that the scope of persons affected should apply to those discharging both public and private functions. Both offences must relate to conduct undertaken in connection with activities or functions of a public nature, or in connection with a trade, professional, employment or business activity, or activity on behalf of a body of persons. The conduct in question may relate to past as well as to present activities of these kinds.

Clause 1: The “provider” [P] clause

11. Clause 1 sets out two active offences of bribery as it applies to the payer [P]. Each case requires that P offers, promises or gives a financial or other advantage to another. The meaning will be left to the common sense of the tribunal. This is the basic element.

12. In each case there must be a second aspect, either:

- i) P intends the advantage to induce or reward improper performance described as seeking a favour from R, or
- ii) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity described as compromising R.

Clause 2: The “recipient” [R] clause

13. Clause 2 distinguishes four passive cases that apply to the recipient [R]. The basic element of an offence committed by R is that R must request, agree to receive, or accept a financial or advantage for him or herself, or for another.

14. The additional aspect to the basic element is that:

- i) R intended that a relevant function or activity should be performed improperly (whether by R or another person) [Case 3], or

- ii) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity,
- iii) as a reward for the improper performance (whether by R or another person) of a relevant function or activity [Case 5],
- iv) a relevant function or activity is performed improperly either by R, or by another person at R's request or with R's assent or acquiescence [Case 6].

15. As indicated, "improper" conduct means conduct either contrary to an expectation that R would act in good faith or impartially, or conduct involving a betrayal of a position of trust.

16. It does not matter whether R knows or believes that the performance of the function or activity is improper.

17. The offences are free-standing ie the general offence could be committed by P [provider] without R [receiver] being also convicted, and vice versa.

18. Thus the general offences may be boiled down to two simple propositions.

First, was an advantage given or received to induce a reward or reward a person for the improper performance of a function?

Secondly, is that function caught by the act?

19. To avoid issues of local custom and expectation, 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 and any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned. The net effect of this change is much stricter than the current arrangements.

Bribing a foreign public official

20. Clause 6 introduces a "bespoke offence" of bribing foreign public officials. Unlike the general bribery offences in clauses 1 and 2, 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 rationale was expressed by Lord Tunnicliffe during the Bill's passage through the Committee stage: "*the Clause 6 offence is formulated so as to avoid the need to identify precisely the nature of the functions of and duty owed by foreign public officials. Such matters have proved to be one of the difficulties experienced by prosecutors in this kind of case under the current law. Because of its special focus, the Clause 6 offence describes bribery in a different way to the general offences but, equally accurately, describes conduct that would be characterised as corrupt by all right thinking people.*"

21. The Law Commission originally proposed a defence for any person who mistakenly, but reasonably, believed that a foreign public official was required or permitted to accept an advantage under the official's local law but this has not been included in the Bill. The Secretary of State for Justice stated that removing the defence represented the "correct balance" between being fair to defendants and providing "so many rabbit holes" that they could unduly escape conviction. He emphasised that prosecutorial discretion and the good sense of jurors could be trusted to ensure that genuine mistakes were not punished by conviction.
22. The offence is committed if P bribes a foreign public official [F] if P's intention is to influence F in his capacity as a foreign public official. In effect the offence is committed when P wishes to obtain or retain business or an advantage and commits conduct as set out in clause 1.
23. An additional feature is that the written law applicable to F neither permits nor requires F to be influenced in his or her capacity as a foreign public official, such law being:
 - The law of UK if applicable,
 - the applicable rules of a public international organisation, or
 - the law of the country or territory in relation to which F is a foreign public official as contained in its written constitution etc.
24. The offence will also be committed if the advantage is offered to someone other than the official, if that happens at the official's request, or with the official's assent or acquiescence.

The corporate offence

25. The most controversial offence is the proposed new offence targeting companies which fail to prevent bribery by persons acting on their behalf. It

was initially proposed that an ingredient of negligence be part of the offence but discussion through Parliament has meant that the Bill focuses on the collective failure of the company to have in place adequate anti-bribery procedures.

26. Of the new offence, Lord Goodhart said this:

“Clause 7 is a very important clause-perhaps the most important in the Bill. This is because it is extremely difficult under the present law to prosecute a company for a failure to prevent bribery carried out on its behalf. Clause 7 will require all corporations conducting business to treat bribery as a serious issue and compel them to set up proper systems to prevent bribery on their behalf.”

27. Clause 7 creates an offence of failing to prevent bribery which can only be committed by a “relevant commercial organisation,” an umbrella term that encompasses bodies incorporated in this country [and partnerships] and bodies and partnerships, wherever formed or incorporated, who conduct business in the UK.

28. The offence is committed where:

- a person (A) who is associated with the commercial organisation (C) [which means performs services for, or on behalf of C]
- bribes another person [relates to offences contrary to clauses 1 or 6],
- with the intention of obtaining or retaining business or an advantage in the conduct of business for C.

The defence

29. There is a statutory defence for the commercial organisation to show it had adequate procedures in place to prevent persons associated with C from committing bribery offences. The standard of proof the defendant would need to discharge is the balance of probabilities.

30. Lord Bach stated in December 2009 that: *“It is not our intention to drag well run companies before the courts for every infraction. It would be wrong to leave organisations open to a heavy fine if a rogue element within its ranks bribes on behalf of the organisation when those who*

mange it can show they have put in place procedures designed to prevent bribery on its behalf.”

31. A number of Lords sought on Second Reading to find out what is meant by "adequate"; Lord Henley asked the following questions:

- Who is to judge what is adequate and what is not?
- If a company has stringent rules in place, checks on its employees, has transparent accounting and so on, but a determined associate of that company still manages to bribe another, were those procedures adequate? They did not, after all, prevent the offence of bribery taking place.
- What about a company with weak procedures in place which nevertheless managed, perhaps more by chance than anything else, to stop an embryonic plan to commit bribery? Which of those cases should be prosecuted?
- What about the commercial organisations themselves? How will they know if they have put in place adequate procedures?

32. In a written response, Lord Bach has confirmed that *“it is essential for commercial organisations to have access to guidance on the meaning of ‘adequate procedures’*”. Importantly, the guidance will be published before that clause is enacted. Lord Bach referred to information from reputable organisations and suggested that guidance from GC100 might help inform the debate¹. There is no statutory requirement for guidance. However, such was the force of the debate the government is to look at the issue again. Validly and collectively voiced by the Lords in a cross-party show of unity was this question: why should any guidance not be statutory if it is clear that it will be taken into account by the courts?

33. In preparation for the implementation of this legislation, many companies will be putting into place compliance procedures. The SFO and City of London police have both stated that they wish to provide as much assistance as possible to prevent bribery and corruption. They wish to encourage self-reporting by companies who uncover corrupt acts by members of staff. The fact of self-reporting and assurance of systems in place will reduce the size of any fine.

¹ <http://www.justice.gov.uk/publications/docs/bach-letter-adequate-procedures-guid>

34. Some assistance may be gleaned from sentencing guidelines in the US in relation to procedures that may be taken into account and include According to the Sentencing Guidelines, a "compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and deterring criminal conduct." Under the Sentencing Guidelines, the following elements are critical to a comprehensive compliance program: (1) due diligence (2) promote a culture of ethical conduct (3) establishment of policies and procedures; (4) corporate governance oversight; (5) high level involvement with a specific individual assigned overall responsibility; (6) education and training; (7) monitoring, auditing, and evaluation of compliance program; (8) reporting hotline; and (9) disciplinary action. See Sentencing Guidelines, at § 8B2.1. [www.ussc.gov/2009guid/].
35. Notwithstanding extensive consultation, it is usually the case that matters must be brought before courts before the law settles into familiar patterns. Various commentators have raised scenarios that might fall within the new law and therefore fall within the criminal courts. The Bill is silent on these areas. A broad discretion has been left to the prosecution to determine whether a case should be prosecuted.
36. Example 1: corporate hospitality was discussed by the House of Lords and consideration was given to amending the bill to provide a defence where corporate hospitality. No defence has been added. In seeking to reassure their Lordships, Lord Tunncliffe subsequently wrote: 'We recognise that corporate hospitality is an accepted part of modern business practice and the Government is not seeking to penalise expenditure on corporate hospitality for legitimate commercial purposes. But lavish corporate hospitality can also be used as a bribe to secure advantages and the offences in the Bill must therefore be capable of penalising those who use it for such purposes.'
37. Example 2: facilitation payments which are recognised as an exception to the usual rules on bribery in the US Foreign Corrupt Practices Act. They are payments to facilitate or expedite 'routine governmental action'. The Bill provides no such exception in English law. Although it is unlikely that a small facilitation payment, extorted by a foreign official in countries where this is normal practice, would of itself give rise to prosecution in the UK, the matter is one that will be a matter for guidance and prosecutorial discretion.

Jurisdiction

38. Actions abroad will constitute an offence prosecutable in this country if the person performing them is a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.

Offences by senior officers

39. Clause 13 creates a liability for senior officers if the body corporate commits an offence contrary to clause 1, 2 or 6 and that offence was committed with the consent or connivance [turning a blind eye] of a senior officer or persons purporting to act in such a capacity. In those circumstances, the officer is guilty of the principal offence. Such officers must have a close tie to the UK.
40. Senior officer means in relation to a body corporate, a director, manager, secretary or other similar officer. 'Director' in relation to a body corporate whose affairs are managed by its members means a member.

Consent to prosecute

41. Offences under the older law generally required the consent of the Attorney-General. The Bill requires the consent of the three relevant directors, that is to say the Directors of Public Prosecutions, the SFO and Revenue and Customs Prosecutions. In practice such consent can be given by lawyers in the respective organisations. Disquiet was expressed in the House of Lords at the diminishing of the role of the Attorney-General. Lord Mackay, in his speech to the House, thought it, *"highly undesirable to reduce the responsibility of the Attorney-General, who is accountable to Parliament, in this area;"* he is not alone in that observation. On 7 January 2010, Lord Henly commented thus: *"...it is important that someone who is answerable in this House or in another place should have the ultimate responsibility for that.... We do not believe that the role of the Attorney-General should be downgraded in this way."*

The defence of legitimate purposes

42. Clause 12 deals with the legitimate functions of law enforcement agencies, the intelligence services or the armed forces which may require the use of a financial or other advantage to accomplish the relevant function.

Prosecution powers - Compulsory powers

43. In order to demonstrate commitment to fighting corruption, amendments have been made to existing prosecutorial powers to extend them to the investigation and prosecution of corruption.

44. Section 2 Criminal Justice Act 1987 empowers the SFO to compel persons to:

- answer questions in interview [thereby over-riding the right to silence]
- produce documents.

Non-compliance is punishable by imprisonment. The power was extended to cover corruption investigations.

45. Section 62 Serious Organised Crime Police Act 2005 empowers service of a disclosure notice which compels:

- answering of questions,
- provision of information, and
- production of documents.

Non-compliance is an imprisonable offence. It has been extended to cover corruption offences.

46. Part 5 of Proceeds of Crime Act 2002 has similar powers when investigating money laundering offences.

47. It should be borne in mind that these powers are not limited to use on the suspects in such investigations. The orders can apply to any person who meets the criteria.

48. In July 2008 the Government extended to prosecutors non-conviction based civil asset recovery powers previously only exercised by the Assets Recovery Agency (now SOCA). These were first used by the SFO to settle a case which began on the basis of foreign bribery allegations against an English company in October 2008, resulting in the recovery of £2.25m for inaccurate accounting of irregular payments by an overseas subsidiary of the company.

Conclusion

49. There is no doubt that significant changes will take effect. Companies will seek to reduce the scope of their liability by taking adequate safeguards. The real issue is the extent to which such procedures will be deemed to be sufficient.

Sean Larkin
Rachna Gokani
QEB Hollis Whiteman Chambers
27 January 2010