

# *The Bribery Act*

*Louise Delahunty*

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# *“Lawyers must tackle corruption”*

- Global survey conducted by IBA
- Answered by 642 private practice business lawyers in 95 countries
- Survey revealed “amazingly low” level of awareness
- 40% of respondents not aware of any anti-corruption conventions
- 40% do not appreciate scope of US FCPA
- 70% unaware of UK’s further reaching laws
- Over 40% know members of legal profession in their country who have engaged in corrupt activities
- Over 50% lost business to lawyers prepared to pay Government officials on behalf of foreign companies
- Real estate, energy, environment and infrastructure most vulnerable sectors

# What you need to know about the Bribery Act

# *Key issues*

- Comes into force 1 July 2011 (not retrospective)
- Covers: UK companies, UK citizens or residents
- Extra-territorial: bribery anywhere
- Foreign companies with operations in the UK can be caught by the new corporate offence
- Covers bribes to foreign public officials and business to business (“private”) bribery
- Stricter than US FCPA: no ‘facilitation payments’ exception and no marketing expenses defence

# Overview

- Two general offences: bribing another and requesting/receiving a bribe
- Failure to prevent corruption: the corporate offence
- Foreign public officials offence
- “Consent and connivance” provision applicable to senior officers: liability of senior officers

# General offences

## Bribing another and requesting/receiving a bribe: Sections 1 & 2

- Corruption: offering/giving (or receiving) an advantage, intending to induce or reward improper performance; or knowing or believing that acceptance would in itself be improper
- Improper: In breach of expectation of what a reasonable person in the UK would regard as acting in good faith, impartiality, or what expected from a person in a position of trust
- Advantage may be offered through a third party
- The person advantaged and the person behaving improperly may be different
- Jurisdictional reach
  - Activity in the UK
  - British citizens
  - individuals ordinarily UK resident
  - corporate bodies incorporated in the UK



for corruption anywhere  
in the world

# *The Foreign Public Official offence (1)*

## Bribery of an FPO: Section 6

- FPO = anyone who:
  - holds a legislative, administrative or judicial position
  - exercises a public function (inc for any public agency or enterprise)
  - is an official of a public international organisation
- Payer must intend:
  - to influence FPO
  - to obtain or retain business or an advantage
- Note: no requirement of impropriety – what about legitimate promotional expenditure?

(See recent MOJ Guidance “the Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure” and para 28 “(prosecution must show) a sufficient connection between the advantage and the intention to influence and secure business or a business advantage” and SFO Guidance “Lavishness is just one factor...”)

- Defence – if written local law permits or requires FPO to be influenced by the advantage
- Jurisdiction – as for general offences

# *The corporate offence*

## Failure to prevent corruption: Section 7

- Failure by Corporate ('C') to prevent bribery by another ('A')
- 'A' is performing services for C (A is "Associated Person")
  - employee
  - agent
  - subsidiary
  - JV
- A intentionally bribes X for C's business/advantage
- Jurisdiction: UK incorporated companies and foreign companies carrying on a business or a part of a business in UK
- Who is an "associated person"? How wide is the net?

Defence is to show adequate anti-bribery procedures in place

# Proceeds of Crime

# Proceeds of Crime

- Regulated sector:
  - duty to report knowledge/suspicion of money laundering (anywhere in the world)
  - privilege exception
- Regulated and unregulated sectors:
  - risk of money laundering if dealing with proceeds of crime
  - SARs pre and post transaction
- Revenue from a corruptly obtained contract = proceeds of crime
- Due diligence

How does this affect overseas entities?

## Territorial application

### Individuals

- British citizens
- Broad application, including individuals ordinarily resident in the UK
- Issue: secondments to/from the UK

### Corporates

- Overseas companies carrying on part of a business in the UK
- Branches of overseas banks and companies
- UK subsidiaries and joint ventures

“The Bribery Act will give me jurisdiction in respect of the activities abroad of foreign corporates that have some business presence here. It is an important extension of our jurisdiction and one that we would want to use to its fullest extent.”

**Vivian Robinson QC**

**General Counsel, SFO**

# Adequate procedures – how you can manage your risk

# *Adequate procedures*

*Continued...*

- Defence:
  - Adequate procedures
  - Burden of proof: defendant
  - Defence standard of proof: balance of probabilities
- Adequate, not absolute, procedures/reasonable, assurance/adequate risk management systems

# *Adequate procedures*

*Continued...*

## MOJ Guidance

- MoJ/Guidance
- Six Principles
  - Risk assessment
  - Top level commitment from the senior officers in a company
  - Due diligence
  - Proportionate procedures – gifts, hospitality, donations etc
  - Effective implementation
  - Monitoring and review
- Scenarios
- Risk based approach
- Prosecutorial guidance – CPS and SFO
- Law Society and other guidance

# *Adequate procedures*

## A global anti-corruption policy?

- A single global standard?
- Risk assessment – who is performing services for you?
- Culture of compliance from the top
- Local cultures and business practices
- Contracting with third parties
- Joint Ventures
- Gifts and hospitality
- Sanctions for employee breaches
- Policy for self reporting
- Ongoing monitoring and risk audits

# High Risk Activities

# *High Risk Activities?*

- Use of intermediaries / introducers
- Foreign public officials
- Excessive hospitality
- Customer corruption/AML risk
- M&A

# Enforcement and Penalties

# SFO Self Reporting Guidance

- July 2009, SFO produced guidance regarding its approach to dealing with overseas corruption
- Preferred form of engagement:
  - company to carry out an internal investigation to determine whether "...there is a real problem and that remediation and cultural change..." are required.
  - if so, the company should self report to the SFO on that basis.
- Provided the company:
  - pays a penalty based on the benefit accrued as a result of the bribe with interest (plus the SFO's costs); and
  - institutes a programme of remedial measures agreed with the SFO, and which are independently monitored;
  - the SFO will try to resolve the matter through civil (not criminal) proceedings wherever possible.
- Benefits of self reporting:
  - civil proceedings avoid debarment under EU procurement rules (article 45 of the EU Public Sector Procurement Directive).
  - the company can conduct its own investigation - the process is within its control (as are costs) and it can then minimise disruption to business.
  - agreed press release

# Penalties

## Individuals

- Up to 10 years imprisonment, a fine or both
- Director disqualification

## Corporates

- Unlimited fine
- Asset confiscation
- Debarment from public procurement
- Reputation

# Louise Delahunty

T: +44 20 7959 8483

E: [delahuntyl@sullcrom.com](mailto:delahuntyl@sullcrom.com)

- Louise has more than 20 years' experience as a leading business crime lawyer. Having been a member of UK Government and EU committees dealing with the roll out of new money laundering law and regulation, and representing the legal profession at the highest level, Louise is known to be at the forefront of learning in this area and is not afraid to challenge Government thinking on proposed measures. She is a past Chairwoman of The Law Society's Money Laundering Task Force and Government Money Laundering Advisory Committee.
- Louise is a well-known speaker for the American Bar Association, International Bar Association and C5 conferences and gives tailored training for clients. She has trained many financial institutions, represented the UK at the Financial Action Task Force meetings, and trained the World Bank. She writes for Cordery, City & Financial, and is an editor of the Informa Financial Crime Reports. She writes for broadsheets, particularly the Daily Telegraph and is regularly quoted in the media.
- Louise is a member of the Attorney General's Plea Negotiation Panel and on 03 June 2009 gave evidence to the Parliamentary Select Committee on the new Bribery Bill.

Louise Delahunty: Ranked: Tier 1: Fraud, Criminal: Legal 500 and Chambers 2010

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