

## Bribery Act 2010 receives Royal Assent, and overhauls outdated anti-corruption laws

### April 2010

Everyone knows what a bribe is and the outlawing of bribery and corruption has been a focus of parliament since the Magna Carta declared that “We will sell to no man ...either justice or right”.

To actually define bribery and corruption as a matter of law, however, has proved to be more complex. The latest attempt to address the problem has just hit the statute books; the Bribery Act 2010 received Royal Assent on 8 April, in the culmination of over a decade’s work on reforming Britain’s existing anti-corruption laws. The key provisions of the Act will come into force on a date yet to be specified by the relevant government minister, but likely to be in October of this year.

There was perceived to be a clear need for legislative shake up as far back as 1989, when the UK signed up to the Organization for Economic Co-operation and Development (OECD)’s anti-corruption convention. Indeed the Law Commission released a new draft Bribery Bill as far back as 1998, although progress was slow as there was no consensus as to the best legislative approach to take.

On average, only 21 people per year (and no corporate bodies) were prosecuted for public sector corruption between 1993 and 2003. By comparison, there were an average of around 23,000 prosecutions per year between 1997 and 2001 for *private* sector fraud. This discrepancy was due not least to the fact that the existing anti-corruption legislation dated back to the early 1900’s and was vague and outdated.

The project to reform the law took on a new urgency in the light of several recent high-profile corruption cases, the most infamous being BAE Systems and the “Al Yamamah” fighter jet deal (in which the Attorney-General (a political appointment) called off the investigation into corruption, allegedly at the insistence of prime minister Tony Blair). These cases have resulted in Britain’s plunging to an embarrassing 17<sup>th</sup> place in Transparency International’s 2009 “Corruption Index”.

## **What is the new law?**

The Bribery Act applies in England and Wales and simplifies the existing law on bribery, enabling the courts to deal with it more effectively.

The Act creates offences of, amongst others, bribing another person/company/public body or accepting a bribe in return for giving an advantage to the briber. It also creates a “strict liability” offence for companies (but not public bodies) who negligently fail to prevent bribery within the business. The Act also introduces a new offence of bribery of foreign officials, which will be particularly relevant to multinational companies who operate in areas of the world where corruption and “facilitation payments” are commonly found. It also removes the requirement for Attorney-General consent to prosecution; proceedings may now only be brought at the instigation of the Director of a relevant prosecuting authority.

Of particular interest to contracting authorities, however, is the offence under section 2 in which a person “requests, agrees to receive or accepts” an advantage of some kind in return for improperly performing, or allowing the improper performance of, a “function or activity” where that function/activity is either of a public nature or done in the course of a business.

In the contracting authority context, a function or activity will be a “relevant function or activity” for the purposes of the Act if it is of a public nature and a person performing it is expected either (a) to perform it in good faith, (b) to perform it impartially or (c) the person is in a position of trust by virtue of performing it. If the function/activity is caught under one of these tests, then the Act states that it will be “improperly performed” if there is a breach of an “relevant expectation”. This “expectation” is itself an objective test of what a reasonable person in the UK would expect in relation to the function/activity.

The Act makes it clear that if the bribery offence is committed with the consent/connivance of a senior officer of the contracting authority, then that person is also personally guilty of an offence. This will potentially catch all those working at manager level and upwards.

Penalties under the Act include fines and/or imprisonment for up to ten years (for the more serious offences).

## **What are the implications for contracting authorities?**

Contracting authorities could therefore be guilty of bribery if, for example, they agree to “fix” a procurement evaluation process in the briber’s favour in return for some advantage. It seems it would also be possible for a contracting authority to be guilty of bribing a supplier if it offers some sort of advantage to a supplier in return for the supplier agreeing to improperly perform an activity connected with the running of its business (e.g. bribing the supplier to submit a lower-priced bid than it would otherwise have done).

The Office of Government Commerce will no doubt be publishing updated boilerplate standard clauses on the prevention of corruption, which take into account the Act’s provisions and which contracting authorities will need to ensure are included in public contracts. Contracting authorities may also like to address in public contracts the consequences of a supplier being found guilty of a Bribery Act offence. For example, the

prosecution of a major supplier for negligent failure to prevent bribery is likely to be embarrassing for a contracting authority, which may wish to have the option of immediately terminating the contract in these circumstances.

***Jenny Beresford-Jones is a professional support lawyer specialising in commercial and public procurement law at Mills & Reeve LLP. She maintains the free-to-use procurement law resources website [www.procurementportal.com](http://www.procurementportal.com).***

**Jenny Beresford-Jones**  
**Professional Support Lawyer**  
**for Mills & Reeve LLP**  
**+44(0)121 456 8361**

The contents of this document are copyright © Mills & Reeve LLP. All rights reserved. This document contains general advice and comments only and therefore specific legal advice should be taken before reliance is placed upon it in any particular circumstances. Where hyperlinks are provided to third party websites, Mills & Reeve LLP is not responsible for the content of such sites.

Mills & Reeve LLP is a limited liability partnership regulated by the Solicitors Regulation Authority and registered in England and Wales with registered number OC326165. Its registered office is at Fountain House, 130 Fenchurch Street, London, EC3M 5DJ, which is the London office of Mills & Reeve LLP. A list of members may be inspected at any of the LLP's offices. The term "partner" is used to refer to a member of Mills & Reeve LLP.