

Updated Guidance Note on The Bribery Act 2010

The Bribery Act 2010 (“the Act”) took effect on 1 July 2011. It represented a complete overhaul of anti-corruption law in the United Kingdom. The wide scope of the Act means that compliance will not be straightforward. Since conception there have been prosecutions and convictions albeit many of these relate to overseas activity and bribery of foreign public officials. Unlike much of our legislation the Act is domestic UK legislation and therefore will not be altered by the exit from the EU.

Why is the Act relevant particularly to the construction and engineering sector?

The Property, construction and engineering industry is particularly exposed to the Act as a result of:

- the nature of the projects and contracts undertaken in the industry (large scale, often “one offs” and involving significant sums of money); and
- the often necessary involvement of, and/or interaction with, government departments or officials, whether as end customers or in the provision of requisite licences and consents;

Hindley Lawrence has done and will continue to manage these risks through education and training and by having appropriate and proportionate safeguards.

What are the offences?

The Act repealed the common law offence of bribery as well as various statutory offences dating back to 1889.

In their place it established four categories of offences.

The first three are capable of being committed by an individual or a company, whilst the fourth can be committed by a company only. The categories are:

- 1) Bribing another person;
- 2) Being bribed;
- 3) Bribing a foreign public official (unlikely to be relevant to our business); and
- 4) Failure of a commercial organisation to prevent third parties paying bribes on its behalf.

The Act does not contain any of the exemptions seen in other legislation for example in the US such as for (i) facilitation payments and (ii) “reasonable and bona fide” travel and lodging expenses incurred on behalf of government officials. Importantly the Act also

makes no distinction between public and private and applies to both public and private sector bribery.

Personal liability of senior officers

A director, or senior officer who “consents or connives” at the commission of offence 1, 2 or 3 by an organisation may be found personally liable for that offence. “Senior officer” is widely drawn so as to include directors, managers, corporate secretaries or “other similar officers” of the organisation.

As explained at the various training sessions and in discussions about the Act and our Bribery Prevention Policy at Development Reviews, all surveyors in Hindley Lawrence because of the responsibilities and authority they are given by the Company would be classed as senior officers.

Unnecessary to prove dishonesty or corrupt intent

The Act does not require a prosecutor to prove an element of dishonesty or corrupt intent in order to achieve a conviction. Rather, in relation to the offence of bribing another person, it is necessary to prove that:

- a financial or other advantage was offered, promised or given (whether directly or indirectly) to another person;
- with the intent to induce that person to perform improperly (or reward them for the improper performance of) a relevant function or activity.

The Act defines “relevant function or activity” broadly to include all manner of public and private sector activities, provided that the person performing the activity is in a position of trust by virtue of performing it, or is expected to perform it in good faith or impartially.

The majority of senior key stakeholders we deal with in the public sector would fit into this category. This means at all times when either you or the person you are dealing with at a stakeholder/client are in a position to influence the award of a contract there should be no transactions, gifts or promises of such made or received.

Corporate Offence - Failure to Prevent Bribery by Associated Persons

The Act includes a strict liability offence that can be committed by a company or partnership only. The offence arises where a person associated with the organisation is or would be guilty of offence 1 (bribing another person) or offence 3 (bribing a foreign public official) and this bribery was carried out in order to benefit the organisation. In such circumstances, the organisation will be criminally liable for “failing to prevent” the

bribery, unless it can demonstrate that it had “adequate procedures” in place designed to prevent such bribery taking place.

The person associated with the organisation may be its (i) employee; (ii) subsidiary; (iii) joint venture partner; (iv) agent; (v) consultant; (vi) outsourced service provider, etc., although it is important to note that there is no requirement that a contractual relationship is in place between the organisation and the associated person. Ultimately, the question of whether a person is sufficiently “associated” with the organisation to expose it to liability will turn on the specific facts of each case.

Since the Act was published there has been more guidance on “associated person”:-

- Only relates to suppliers of goods and services
- The entire “supply chain” is not classed as “associated person” – the Guidance recognises that an organisations ability to control the acts of parties further down the chain may be limited to asking its direct supplier to adopt appropriate anti-bribery approach with the next party down the chain and so on
- The risks presented by joint ventures are also to be treated more realistically and following the guidance simple participation in the joint venture does not open up the participant to liability for bribery by the joint venture or its employees.

Adequate procedures and control of our supply chain and associates

The concept of using “agents” in Hindley Lawrence’s business relates mainly to commercial and residential property agents other than those cases most of our deals are brokered by our employees direct. Our protocol documents include a standard form of appointment for such agents with appropriate warranties and requirements as regards the new offences under the Act.

In the case of all such third parties with whom we contract we will continue to monitor their approach to the Act and it may be a ground for ceasing to do business with such parties if they do not have adequate anti-bribery procedures in place which in turn could expose Hindley Lawrence under the Act. To date we have not met with any such refusals.

In relation to the other adequate procedures Hindley Lawrence implemented in response to the Act, these are reflected throughout the rest of the anti-bribery policies. As set out below we do of course also require all employees to be aware of the offences under the Act and comply with the policies.

Facilitation Payments

The Act makes no exception for Facilitation Payments, as has been done in other jurisdictions. Facilitation Payments are small payments demanded by officials to provide a service that they are obligated to perform eg processing a building regulation

approval or such like. Any such payments are unlawful and entirely inconsistent with how Hindley Lawrence operate as a business.

In the UK where all Hindley Lawrence projects are situated. Facilitation Payments are probably less likely than in certain other jurisdictions, however the UK construction and engineering industry has been the subject of investigations for illegal practices in the past, so it is an industry the regulators may focus on.

In the event you are approached or requested to make a Facilitation Payment immediately speak to a Director to discuss how best to reject such request and report the individual concerned.

Gifts and Corporate Hospitality

Gifts and hospitality are very much a part of the business culture in the UK. It is recognised that it can be difficult for staff to know what is appropriate in terms of giving and receiving gifts and hospitality. Gifts and hospitality can be used to influence and corrupt third parties and on occasion to manoeuvre the recipient into a position of obligation.

Our policies on expenses and gifts and hospitality have been revised both in light of the Act and are kept under regular 6 monthly reviews. If you are in any doubt after reading these policies do not hesitate to clarify the position with a Director. If in doubt in a situation please ask.

How will the Act affect the tender process? EU Public Procurement Directive

Pursuant to this Directive (implemented in the UK by the Public Contract Regulations 2006), public authorities must exclude a company from tendering for public projects if the company, its directors or “any other person who has powers of representation, decision or control” over the company is convicted of a bribery offence.

It is likely that these mandatory exclusion provisions would kick in following a relevant conviction for offences 1, 2 or 3.

However, it is unclear whether mandatory exclusion would also arise where a company is convicted of the “failure to prevent” offence. There is significant risk that it would apply and such an exclusion would be a disaster for Hindley Lawrence, underlining the need for all staff to be alert of any situations where an offence could be committed.

What action is required of you?

- You have been made aware of the Act and have easy access to this summary and the rest of our policies and you should take the time to understand the offences.

You are also reminded to take the time to familiarise yourself with all relevant Hindley Lawrence policies and particularly the Ethics Policy and Gifts and Hospitality Policy.

- Be alert to any “indicators of corruption” with third parties or amongst other members of staff such as:-
 - pressure to make payments urgently or ahead of schedule
 - payment requests involving third party bank accounts or companies
 - high or unusual levels of fee percentages being requested
 - private meetings with public contractors or would be tenderers
 - lack of transparency/individuals hoarding relationships
 - “maverick” leadership
 - receipt of lavish gifts
 - surprising/illogical decisions in acceptance of contracts
 - agreeing contracts on unfavourable terms
 - lack of documentation of meetings or decisions
 - non-adherence to company procedures

The Directors oversee all risk and compliance matters for Hindley Lawrence therefore if you have any questions approach them. If at any time you feel uncomfortable reporting a matter internally please utilise Raising Concerns the externally administered confidential service.

- Training has been arranged for our employees appropriate to their position in the company and the Directors will continue to keep under review the need for further employee training in this area and will monitor the effectiveness of such training based on feedback.
- The Directors keeps under review our payment screening and due diligence procedures vis-à-vis third party payments.
- The adequacy of the contractual representations and warranties given by business partners (for example in JVs), third party consultants, agents or other outsourced service providers has been updated and will be kept under review to include additional clauses for appointments and contracts. Please ensure you adopt latest guidance on your projects.
- The fact that much of our business is conducted with long standing known business partners, third parties and outsourced service providers is a benefit but we will keep under review whether or not the initial and ongoing due diligence we conduct on such parties would survive scrutiny by the criminal or regulatory authorities.

- The Directors are in a good position as regards the management information available to enable it to assess the bribery and corruption risks facing the organisation but this continues to be kept under review every six months. The Directors take such risks seriously and in the way in which each of the Directors conduct their relationships with third parties seek to set the tone for the organisation as a whole.

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