

service and refer clients to specialist providers when appropriate.” <http://www.legalweek.com/legal-week/analysis/2034448/tesco-law-law-lawyers-future-gps>

The hub could be about the physical building – like a drop-in centre – but also about building online communities too, e.g. wikis, FAQs, “your rights”, small business information help and advice, local planning issues, etc. So you might come in for a basic will but go out with an appointment for tax advice/financial planning and also have been referred to the firm’s website for help with the local schools admission policies.

⁶“Diversity, that is my motto. [Fr., Diversite, c’est ma devise.]” Jean de La Fontaine Quotes **Source:** Pate d’ Anguille <http://www.worldofquotes.com/topic/Variety/index.html>

⁷Michael Scutt, ‘Compete on Quality Not Price’, 19 January 2011, <http://troubleahead.co.uk/2011/01/19/compete-on-quality-not-price/>

⁸James Dean, ‘Wigster comparison site signs up Shoosmiths’ consumer arm’, Law Society Gazette, 26 November 2010, <http://www.lawgazette.co.uk/news/wigster-comparison-site-signs-shoosmiths-consumer-arm>

⁹‘60% of people would buy legal advice from brands like Barclays, AA, Co-op and Virgin, 8 March 2011’, <http://www.legalfutures.co.uk/latest-news/60-of-consumers-would-buy-legal-advice-from-brands-like-barclays-aa-co-op-and-virgin>

¹⁰Epoq is both a company and a software brand see www.epoq.co.uk/

¹¹www.halifaxlegalexpress.co.uk/

¹²Catherine Baksi, ‘Legal brand to launch national franchise’, 23 September 2010, <http://www.highstreetlawyer.com/news.asp>

¹³‘Too little too late?’ NLJ 11 March 2011 <http://www.newlawjournal.co.uk/nlj/comment/reply/6954> and Can Face2Face Solicitors really call itself a franchise? Solicitors Journal, 15 March 2011

¹⁴Justice Minister supports ‘one stop shops’ for legal services, 23 September 2010

¹⁵Grania Langdon-Down, ‘Family lawyers face up to challenges ahead’, 17 March 2011 <http://www.lawgazette.co.uk/features/family-lawyers-face-challenges-ahead>

¹⁶Stop Press addendum, The Law Society Council have agreed to the SRA’s application to become a licensing authority for ABS (LSG 31/3/11)

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The Bribery Act: What’s all the Fuss About?

Abstract: Amy Bell examines the controversial Bribery Act which will come into effect on 1st July 2011 and why most businesses will have to prepare for it.

Keywords: money laundering; bribery; law firms

Introduction

Much has been written in the last 12 months about this Act, but why? In this article I am going to look at the offences under the Act, the thorny issue of facilitation payments and the controversial corporate offence, as well as how firms need to prepare for the Act coming into force on the 1st July 2011. First of all, the penalties. There is a 10 year prison sentence, not to mention an unlimited fine, and further, the prospect of being unable to



Amy Bell

tender for public contracts if found guilty of bribery. No wonder organisations are sitting up and taking note of the Act.

Three Main Bribery Offences

The Act brings together for the first time three main bribery offences. <http://www.legislation.gov.uk/ukpga/2010/23/section/1>

I Offences of bribing another person E + W + S + N.I.

This section has no associated Explanatory Notes

(1) A person ("P") is guilty of an offence if either of the following cases applies.

(2) Case 1 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P intends the advantage—

(i) to induce a person to perform improperly a relevant function or activity, or

(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

(5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

2 Offences relating to being bribed England, Wales, Scotland and Northern Ireland

This section has no associated Explanatory Notes

(1) A person ("R") is guilty of an offence if any of the following cases applies.

(2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly, whether by R or another person.

(3) Case 4 is where—

(a) R requests, agrees to receive or accepts a financial or other advantage, and

(b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.

(4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance, whether by R or another person of a relevant function or activity.

(5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly—

(a) by R, or

(b) by another person at R's request or with R's assent or acquiescence.

(6) In cases 3 to 6 it does not matter—

(a) whether R requests, agrees to receive or accepts or is to request, agree to receive or accept the advantage directly or through a third party,

(b) whether the advantage is, or is to be, for the benefit of R or another person.

(7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.

(8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

Prior to the Act, the law on bribery was a mixture of legislation and case law which had become difficult to navigate.

Section 1 makes it an offence for a person to offer, promise, or give, a financial or other advantage to another person where he intends the advantage to bring about the improper performance by another person, of a relevant function or activity or he knows or believes that the acceptance of the advantage constitutes in itself improper performance of a relevant function or activity.

Section 2 makes it an offence for a person to request, or agree to, or accept, a financial or other advantage:

- Intending that the relevant function should be performed improperly, either by them or a third party,
- When to do so, in itself will be improper performance of a relevant function,
- As a reward for carrying out a relevant function improperly, or
- Anticipation or consequence that they (or someone else on their behalf) perform a relevant function improperly.

Both of these offences talk about relevant function. A relevant function for the purposes of the Act has to be:

- Any function of a public nature, or
- Any activity connected with a business, trade or profession,
- Any activity carried out in the course of a person's employment, or any activity carried out by or on behalf of a body of persons (whether corporate or unincorporated).

This relevant function also has to be performed by a person who is expected to perform it either in good faith, impartially or, by virtue of performing the activity, the person doing so is in a position of trust. This assessment of good faith, impartiality or trust, is that of what is expected of a reasonable person in the UK. Where, in another country for example, there is a local custom that payments are made to the Mayor before any contract is awarded, the test will be whether a reasonable person in the UK would consider that to be a bribe. Local and accepted customs are disregarded unless the practice is contained in the local law.

Both of these offences have wide territorial application. The offence does not have to take place in the

UK but the person committing the offence must have a close connection to the UK. This might mean that they are a British citizen, British overseas territory citizen, an individual ordinarily in the UK or a body incorporated under the law of the UK.

Section 6 is the offence of bribery of a foreign public official. The offence is committed where a person offers, promises or gives financial or other advantage to a foreign public official for the intention of influencing that official in the performance of his or her official function. The offender must also intend to obtain or retain business or an advantage in the conduct of business for doing so. This is not an offence if the official is permitted or required by a local written law to be influenced by the advantage. It covers circumstances where some sort of additional investment in the local economy or to benefit the local community is required as part of a tendering process.

What are facilitation payments?

These are more commonly known as “grease” payments. They might be made to overseas local customs to ensure smooth passage of goods through a country or to protect someone from threats of physical harm. On this issue we go further than our American cousins, who allow such payments under the Foreign Corrupt Practice Act. We can take some comfort from the Ministry of Justice Guidance MOJ guidance <http://www.justice.gov.uk/guidance/bribery.htm> which advises that the common law defence of duress would be available where an individual is left with no alternative but to make the payment for personal protection.

Where does all this leave corporate hospitality?

When the Act was first passed there was panic over this. The draft guidance was widely criticised for the lack of clarity on the matter.

The final guidance, which was issued on the 30th March 2011, sets out the Government’s position. The guidance confirms that corporate hospitality is recognised as an established and important part of doing business and that the Act is not intended to criminalise this behaviour. The emphasis is on reasonable proportionate hospitality and activities. The prosecution has to prove a connection between the financial or other advantage offered and the intention to bring about the improper performance of a relevant function (section 1) or influence and secure a business advantage (section 2). The more lavish the entertaining, the easier this is to imply.

A business can continue inviting clients and contacts to sporting and other events and dinners and offer gifts to them as a reflection of their good relationship, provided that it is reasonable and proportionate for their

business. Solicitors can continue to buy their local estate agents the customary wine hamper at Christmas.

New corporate offence of failing to prevent bribery

The fourth offence under the Act is the new and controversial corporate offence of failing to prevent bribery. Section 7 says an offence is committed by a relevant commercial organisation when a person associated with it bribes another person intending to obtain or retain business for that organisation, or to obtain or retain an advantage in the conduct of business for that organisation. The term “relevant commercial organisation” means any partnership or incorporated body set up under UK law which carries on business anywhere in the world, or a partnership or incorporated body in any other jurisdiction which carries out business in the UK. There was some concern that the drafting of this section would discourage business from operating in the UK where their operations are limited to listing on the London Stock Exchange. The recent guidance has clarified this position and confirmed that carrying on a business is more than just being listed on a stock exchange.

At first glance this looks like an extremely draconian measure. The commercial organisation will be liable for the act of its employee, agent or subsidiary of its organisation and that person, or entity, may be conducting themselves outside the remit of their employment or contract with the relevant commercial organisation.

There is a defence to Section 7 that the commercial organisation had in place adequate procedures designed to prevent the persons associated with it from undertaking such conduct. The guidance recommends procedures which an organisation might consider putting in place to aid their defence. They also recommend that before dashing off to make a lot of policies and procedures, organisations should stop and assess the risk of exposure to bribery, as in fact there is no requirement to have these policies. It is not an offence not to have policies in place. However with such stringent penalties who would take the chance that they would never need to avail themselves of the defence?

There are some other businesses where bribery might be high risk. They might conduct business in jurisdictions where bribery is endemic, or where facilitation payments are common practice. In those cases they should consider adequate procedures, which should be informed by the following principles:

Principle 1 – Proportionate procedures

It is envisaged that an organisation will have an anti-bribery policy, which might include its risk assessment

procedures, due diligence of existing or prospective associated people, the provision of gifts, hospitality and promotional expenditure, consideration of charitable and political donations, procedure when faced with a demand for facilitation payments, a policy in relation to financial and commercial control, such as approval of expenditures for hospitality and a “whistle blowing” procedure.

Principle 2 – Top level commitment

It is important for any anti-bribery policy to have effective leadership. This might include confirmation from the top management that they take a zero tolerance approach to the bribery, or to details of the consequences for breach of that policy.

Principle 3 – Risk assessment

Risk assessments might be made as part of preparing to implement an anti-bribery policy but also in relation to individual commercial contracts. Solicitors might want to do this as part of their new client procedures. The risks which might be considered are:

- Country risk – checking whether the country is high risk for bribery. This might be as simple as performing a Google search to look at the perceived levels of corruption in that country.
- Sectoral risk – some sectors are higher risk than others, for example construction and infrastructure.
- Internal risks – might be training, a bonus structure that encourages excessive risk taking, lack of clarity on the organisation's policies in relation to anti-bribery.

Principle 4 – Due diligence

The guidance recommends proportionality and that organisations take a risk based approach. Very often in commercial contracts due diligence will be routinely carried out. The due diligence you do might be on your internal procedures or external consultants. The level will vary enormously depending on the risks arising from your relationship with the associated person. For example, if the commercial organisation does business in a country where it is necessary to engage an agent to ensure the smooth transit of their products through that country, they may want to conduct due diligence on that agent. This might consist of background searches or making enquires with local Chambers of Commerce as to their reputation.

Principle 5 – Communication

The tone of the communication should come from the top management and it is not simply about having a

policy, but also about having appropriate training to ensure that that policy is received and, more importantly, understood. There are various ways of delivering the policy, whether in writing or as live instructor-led sessions or via an e-learning platform. This policy might also be delivered to associated people and could even be published externally on an organisation's website or in their tendering rules.

Principle 6 – Monitoring and review

Risk can change over time and therefore the procedures that are put in place may need to be amended. The guidance suggests formal periodic review or possibly verification from industry bodies. I would stress here that the guidance is extremely clear that there is no obligation under the Act to have policies externally verified.

Section 7 actually encourages businesses to adopt a full anti-bribery policy. This will mean that staff and associated people are educated as to the bribery risks and that these risks are identified and acted upon.

What does this mean for solicitors?

This largely depends on what market and areas of law the firm operates in. Also, there is a distinction between what the management of a firm need to understand in relation to their engagement of associated people and what fee-earners need to consider when acting for clients.

From a management point of view this involves looking at internal policies and procedures, particularly in relation to corporate hospitality. The procedure might contain financial controls and management sign-off of client expenditure for client hospitality, including a statement of what hospitality is proportionate and reasonable for the particular client.

Money laundering

In relation to clients we must not forget the link to anti-money laundering legislation. If a client is involved in bribery and the fee earner forms a suspicion that they are, any property which is dealt with certainly falls under the Proceeds of Crime Act. It is therefore likely that any “whistle blowing” procedures under the anti-bribery policy will be very similar to those under the Money Laundering Regulation 2007. It is expected that the responsibility for monitoring the anti-bribery policy will probably fall to the Money Laundering Reporting Officer.

Conclusion

Although the guidance advocates a risk-based approach to implementing policies and procedures, in reality most

businesses will need an anti-bribery policy and, given the amount of preparation and training which is necessary, lawyers should act now to be prepared for the 1st July 2011.

Biography

Amy Bell is a Senior Associate at Pannone. She manages the compliance team who provide support to fee earners in complying with anti-money laundering legislation. She is a member of the Law Society's Money Laundering Task Force which advises the Law Society on guidance to give to members of the profession, and additionally advises on the approach the Law Society should take when responding to proposals for change. She regularly delivers training on anti-money laundering and the Bribery Act.

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High Kicks and Inner Peace: Knowledge Ninjas at the Legal Ombudsman

Abstract: Sara Meyer, the newly appointed Knowledge Manager at the Legal Ombudsman in Birmingham, describes how they are beginning to set up KM systems to deal with a completely new jurisdiction relating to the hearing of complaints against solicitors. This follows the introduction of reforms contained in the Legal Services Act 2007, which mean that all complaints are now heard by this one organisation.

Keywords: Legal Ombudsman; complaints; solicitors; knowledge management

Introduction

What does a new Ombudsman scheme need more than anything else? Some polished moves to gather and share knowledge, to make sure we know what we need to know to resolve complaints.

The reforms that led to our creation were clear in their intent: simplify the system and provide a slicker operation, so people could be confident that their complaints about lawyers would be resolved independently. This threw down a challenge to us: how to start an organisation from scratch and make sure our 200-odd investigators could show their customers from day one that they could trust us to be fair, effective and, most of all, expert in resolving complaints.

Our jurisdiction is not a simple one. For the first time, complaints about all parts of the legal profession now come under one roof. Before, there were eight different and complex routes to seek redress (in theory, if you were unhappy with the service provided by your notary, the Archbishop of Canterbury was your ultimate appeal route). With us in place, consumers can come to one body. It is simpler.

This means that things are more complicated for us and we think this is just the way it should be. Legal complaints span a rainbow of different issues. We look into complaints from the everyday transactions of conveyancing, divorce and probate, to the areas of high emotion of criminal proceedings, child residency and immigration, to the hugely specialised, such as patent and trade mark issues. The practical concern is often about