

## Bribery Act 2010

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#### **What is the Bribery Act?**

The Bribery Act 2010 reforms the criminal law of bribery, making it easier to tackle this offence proactively in the public and private sectors.

It introduces a corporate offence which means that commercial organisations will be exposed to criminal liability, punishable by an unlimited fine, for failing to prevent bribery.

It repeals the UK's existing anti-corruption legislation – the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Acts of 1906 and 1916 and the common law offence of bribery – and provides an updated and extended framework of offences to cover bribery both in the UK and abroad.

A copy of the Act and accompanying explanatory notes can also be found on the NHS Protect intranet.

#### **When does it come into force?**

The Bribery Act received Royal Assent in April 2010 and will come into force on 1<sup>st</sup> July 2011.

## Why is it relevant to NHS organisations, professionals and staff?

### Organisation

The Department of Health lawyers have advised that it is sufficient for bodies to be incorporated under the law in the United Kingdom for them to fall under section 7 of the Act. Consequently NHS bodies such as PCTs, NHS trusts, foundation trusts, strategic health authorities and special health authorities are all bodies corporate established by order of the Secretary of State under statute. As such, they will become liable, unless they put in place adequate preventative procedures, for acts of bribery and corruption committed by persons associated with them, in the course of their work. The proposed NHS Commissioning Board will also, if established as a statutory corporation, fall under the provisions of the Act. Provided that they are established as statutory bodies corporate, this will also apply to GP Commissioning Consortia.

### Professionals and staff

For the purposes of the Bribery Act, a 'trade' or 'profession' is considered a business. This means that, whether individually or in partnership, GPs, pharmacists, dental practitioners, opticians, finance professionals, etc will also be subject to and personally liable under the Bribery Act.

## Why is it relevant to the NHS Protect?

The remit of NHS Protect includes preventing, detecting and investigating fraud and corruption in the health service. It is directed by the Secretary of State for Health to tackle both offences.

## What is bribery?

Bribery is generally defined as giving someone a financial or other advantage to encourage that person to perform their functions or activities improperly or to reward that person for having already done so.

## What are the key provisions of the Bribery Act?

The Bribery Act sets out four offences:

Section 1 - Offering, promising or giving a bribe to another person to perform a relevant 'function or activity' improperly, or to reward a person for the improper performance of such a function or activity. ('Active' bribery)

Under the Bribery Act, a 'relevant function or activity' is any function of a public nature or any activity connected with a business, performed in the course of a person's employment or performed by or on behalf of a body of persons, whether corporate or unincorporated, which meets one or more of the following conditions:

- a person performing the function or activity is expected to perform it in good faith
- they are expected to perform it impartially
- they are in a position of trust by virtue of performing it.

Section 2 - Requesting, agreeing to receive or accepting a bribe to perform a function or activity improperly, irrespective of whether the recipient of the bribe requests or receives it directly or through a third party, and irrespective of whether it is for the recipient's benefit. ('Passive' bribery)

Section 6 - Bribing a foreign public official (*thought not to be particularly applicable to NHS organisations/staff*).

Section 7 - Failure of a commercial organisation to prevent bribery (the corporate offence). This is a 'strict liability'\* offence and an organisation can be found guilty of 'attempted' or 'actual' bribery on the organisation's behalf. It should be noted that Section 1 or section 6 needs to be proven for a section 7 offence to apply.

Section 14 – Offering or receiving a bribe or bribing foreign official. This section applies if an offence under sections 1,2 or 6 is committed by a body corporate.

\* Strict liability offences do not require proof of intention or recklessness – in other words, it is not necessary for the prosecution to show that the company intended to make the bribe in bad faith, or that it was negligent as to whether any bribery activity took place.

## **Can directors, board members or senior management be prosecuted under the Bribery Act?**

Any individual associated with an organisation who commits acts or omissions forming part of a bribery offence may be liable for a primary bribery offence under the Act or for conspiracy to commit the offence with others – including, for example, their employer.

Likewise, a senior management or board member who consented to or connived in a section 1 or 6 bribery offence will, together with the organisation, be liable for the section 7 'corporate offence' under the Act.

## **Who will investigate and prosecute these new offences?**

No proceedings for an offence under the act may be commenced in England and Wales except by or with the personal consent of the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions.

## **What penalties can be imposed?**

An offence under section 1 (bribing another person) or section 2 (being bribed):

A person guilty of an offence under these sections is liable, on summary conviction (i.e. if tried in a magistrates' court) to imprisonment for a term not exceeding 12 months (subject to section 11(4)(a)), a fine not exceeding the statutory maximum, or both. On conviction on indictment (i.e. in Crown Court), they are liable to imprisonment for a term not exceeding 10 years, a fine, or both.

Any person associated with the organisation in question (this could be an agent or subsidiary of the organisation as well as an employee) who is guilty of an offence under these sections is liable, on summary conviction, to a fine not exceeding the statutory maximum and on conviction on indictment to a fine.

### An offence under section 7 (failure of commercial organisations to prevent bribery):

An organisation guilty of an offence under this section is liable, on conviction on indictment, to a fine. (NB: Even if an organisation has delegated the relevant activities a named individual, it remains responsible for them.)

A 'twin-track' approach can be used to take action against an individual under section 1 and an organisation under section 7 simultaneously.

### **What can NHS organisations do to comply?**

An organisation will have to show that it has implemented 'adequate procedures' designed to prevent individuals associated with that organisation from engaging in bribery in order to avoid liability.

### **What is meant by 'adequate procedures'?**

This relates to relevant compliance protocols and procedures that a commercial organisation can put in place to prevent bribery by individuals associated with it. This might include training, briefing or new internal procedures. The adequate procedures will constitute a 'complete defence' for an organisation.

Under the Bribery Act, a person is considered to be associated with a commercial organisation if they perform services for it or on its behalf. This person can be an individual or an incorporated or unincorporated body.

### **Is there any guidance on what constitutes adequate procedures?**

The Bribery Act requires the Secretary of State for Justice to publish guidance about procedures that relevant commercial organisations can put in place to prevent individuals associated with them from engaging in bribery. The two pieces of guidance were published in April 2011. The full guidance can be found at <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>, whilst the quick-start version can be found at <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-quick-start-guide.pdf>. NHS Protect has also issued guidance as part of its Bribery Act guidance and training package. These documents are available on the NHS Protect secure extranet.

### **Will any advice or guidance be issued to directors, board members or staff on what they should be doing and what their responsibilities are under the Bribery Act?**

NHS Protect will be providing training and issuing guidance to Local Counter Fraud Specialists (LCFSs) to familiarise them with the requirements of the Bribery Act and enable them to offer training to staff in their trusts. The following materials are currently being developed and are expected to be available in 2011:

- training material to be included in the NHS Protect's foundation-level course
- material for LCFSS to use in developing their own presentations

- presentation material to be used in staff induction sessions across the whole of the NHS.

Trusts will be responsible for ensuring that their staff are trained.

### What must NHS organisations do now?

NHS organisations should act now to prepare for the Bribery Act coming into force.

As soon as possible, they should:

- ensure they are aware of the Bribery Act and its related guidance documents
- carry out an assessment of bribery and corruption risks across the organisation
- put in place adequate procedures to prevent bribery from occurring that are *proportionate* to the risks identified
- be clear that, as NHS organisations, they are covered by corporate liability for bribery on the part of their employees, contractors and agents.
- take steps to make their employees, contractors and agents aware of the standards of behaviour that are expected of them: this may include training for groups of employees who might be affected – for example, employees with responsibility for procurement
- review their existing governance, procedures, decision-making processes and financial controls, introduce them if not already in place and, where necessary, provide appropriate training on them
- record the fact that these steps have been taken, as they provide the defence against corporate liability under the act.
- as the monitoring and review process is iterative, the process is repeated on a periodic basis

It is important to note that the Bribery Act will not change the internal disciplinary processes that should be followed to investigate any alleged acts of bribery or corruption before a disciplinary sanction is imposed – NHS organisations should continue to follow their internal procedures in this respect. Care should be taken when a trust follows its internal procedures to ensure that a possible criminal investigation is not prejudiced.

### What should I do if I suspect bribery is occurring?

Staff should report any suspicions or allegations of bribery immediately to one of the following:

- their Local Counter Fraud Specialist
- their organisation's whistleblowing function

- the relevant regional Area Anti-Fraud Specialist
- the NHS Fraud and Corruption Reporting Line (**0800 028 40 60**) or the online fraud reporting form at **[www.reportnhsfraud.nhs.uk](http://www.reportnhsfraud.nhs.uk)**.