

## The Bribery Act 2010 – An update

The Bribery Act 2010 (“the Act”) attracted cross-party support following a Law Commission report and ultimately received royal assent in April 2010, just before Parliament was prorogued for the last General Election.

At that time, the Act was due to come into force in April of this year, and we warned of “the biggest shake up in UK anti-corruption laws for a century”.

The Ministry of Justice then delayed the introduction of the new law a total of 3 times. At the end of January 2011, the Justice Secretary Kenneth Clarke declared that the Government was reviewing the legislation. Mr Clarke promised at that time that there would be a period of 3 months from the publication of new government guidance on the implementation of the new law before it would come into operation.

The reaction of the business community to the postponement was, generally, relief. Meanwhile, the popular press reported that the reaction of the Organisation for Overseas and Economic Development (OECD) was to threaten to put the UK on an export blacklist along with Nigeria, Russia and Israel and others.

True to his word, the guidance that Mr Clarke promised was published on 30 March 2011



and the implementation date for the Act is now set for 1 July 2011.

So: what were the perceived problems with the new Act? Who was to blame for the uncertainty that the Act created? Does the new guidance that has been published resolve all of the uncertainty?

### What are the perceived problems ?

The majority of business commentators agree that the provisions of the Bribery Act, standing alone, lack clarity. Under the Act, companies and individuals alike can find themselves liable for the new bribery offences but, most significantly, there is a new strict liability offence for commercial

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dispute resolution

organisations that fail to put in place “adequate procedures” to prevent bribery by a person associated with their organisation. Organisations can become liable for this offence if the “associated person” commits an offence under the Act – that includes the employees, agents and subcontractors of the organisation. To make matters worse for businesses wishing to avoid corporate conviction, the Act states that offences can be committed by UK organisations, nationals and residents anywhere in the world and that conduct is judged by UK standards as opposed to local ones.

Businesses understandably became concerned about how the Act would be interpreted. There was concern that “a bribe” under the strict terms of the Act is a bribe no matter how small. Without further qualification, the new law might have prevented everything from certain forms of corporate hospitality to a gift of modest backsheesh by an employee to a helpful porter in the Middle East.

Not unreasonably, businesses indicated that they needed to know exactly what would amount to bribery under the Act, and what action they should take to avoid attracting corporate liability for the serious new criminal offences. Bribe payers or directors can face up to ten years in prison if convicted, or an unlimited fine, or both!

**Who was to blame for the uncertainty and dissatisfaction with the Act?**

It is widely agreed that the last government was correct to reform the law. However, the “adequate procedures” defence to corporate liability was not properly defined in the Act and the fault for that most likely lies with draftsmen. This particular inadequacy might now have been remedied by the government guidance but, even if it has been, some level of dissatisfaction will doubtless remain. This is because, depending upon the size and complexity of the business where it operates organisations will still have to bear the burden of putting in place certain systems and procedures to avoid a strict liability corporate offence just when they are fighting their way out of a deep recession.

**Does the new guidance that has been published resolve all of the uncertainty?**

The government has published two booklets on the Ministry of Justice website. The first, entitled “*Quick Start Guide*”, is just 6 pages long and does exactly what it says on the label. It seeks to address some of the more straightforward points of concern voiced by the business community over the course of the last six months in brief and with some success – including concerns about provision of corporate hospitality. The summary advice appears to be designed to alleviate concern about the steps that businesses need to take to be able to rely on the “adequate procedures” defence. However, it is full of words such “may” “might” “likely” and “unlikely” and “reasonable” and is

therefore perhaps less helpful in terms of creating certainty for business. A PDF copy of the booklet can be found at:

<http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf>.

More detailed and therefore perhaps useful input for business is to be found in the second booklet entitled “*Guidance about procedures which relevant organisations can put into place to prevent persons associated with them from bribing*”. This document is 43 pages long and contains more practical advice on proportionate procedures, and some helpful case studies to assist with interpretation of the Act. At first glance this document offers a much more satisfactory exposition of what business managers need to do to avoid falling foul of the Act. A copy of this detailed guidance can be found at:

<http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-quick-start-guide.pdf>

The business community’s reaction to the Government’s publications has, so far, been relatively muted, suggesting that the publications are much more useful than had been expected. In the period coming up to 1 July 2011 we will issue further briefings to comment upon reaction and draw attention to what we consider to be the key points of the advice that has been issued.

# The Draft Defamation Bill – A New Blueprint for Libel Laws?

In his much heralded speech on Civil Liberties earlier this year, Deputy Prime Minister, Nick Clegg, labelled British defamation laws an “international embarrassment”.

This opinion of British defamation laws has gained traction over recent years and the result is that the Government has recently published the draft Defamation Bill (‘the Bill’). One of the goals of the Bill is to turn the British libel laws from an “international embarrassment” to an international blueprint to be followed by the rest of the world.

So, what exactly prompted Nick Clegg to issue such a damning declaration about the current state of our Defamation laws?

One major problem is that people from overseas are able to sue other foreigners for defamation in English courts over articles published outside of England. The reasons for the attraction to English courts are twofold: a) A prospective litigant can issue a libel claim without a substantial connection of either the plaintiff or defendant to England; and b) The defendant speaker has the burden of proving the truth of the challenged statement which can prove extremely costly. This has led to a rise in individuals choosing to issue libel proceedings in England, rather than in their home jurisdiction with which they have a stronger connection. This phenomenon is referred to as “Libel Tourism”.



## Libel Tourism – the problems

Shopping for a favourable jurisdiction in which to bring a claim is not unique to libel claims. However, proponents of libel reform argue that this phenomenon has a chilling effect on free speech. This is due to the fact that a successful defamation claimant is entitled to recover damages and can block future publication of words spoken or published by the defendant that are injurious to the claimant’s reputation. As England is currently perceived to be a claimant friendly jurisdiction many wealthy litigants use the English courts to silence their critics!

The Government is faced with the challenge of striking the right balance between protecting the equally important rights of freedom of expression and reputation protection. In the meantime many wealthy

litigants are rushing to file their libel claims before the changes to the defamation laws take effect.

## An illustration – the Ehrenfeld case

The problem with the current state of the law was highlighted by the seminal Rachel Ehrenfeld case. Ms. Ehrenfeld is the author of a book called “Funding Evil: How Terrorism is Financed – and How to Stop It”.

In her book, Ms. Ehrenfeld documents how Saudi billionaire Khalid bin Mahfouz allegedly funded Al-Qaeda, Hamas and other terrorist organisations. Mr. Mahfouz decided to issue libel proceedings against Ms. Ehrenfeld. Neither Ms. Ehrenfeld nor Mr. Mahfouz had a significant connection to England but the Court considered that it could hear the case as 23 copies of the book had been purchased online through Amazon

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# The Draft Defamation Bill – A New Blueprint for Libel Laws?

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UK. Ms. Ehrenfeld did not mount a substantive Defence due in part to the cost of doing so and damages in the amount of £150,000 were awarded against her. Ms. Ehrenfeld was also barred from further publication of the book in England.

Reportedly Mr. Mahfouz has pursued 30 such libel claims in English courts.

In a later New York action Ms. Ehrenfeld went on to sue to prevent enforcement in the US of her default judgment from England. She was unsuccessful in her attempt, but in a bid to address the issue generally New York State enacted the “Libel Terrorism Protection Act” which served as the model for the “SPEECH Act 2010” which grants a cause of action for declaratory judgment relief against a party who has brought a successful foreign defamation action whose judgment undermines the First Amendment. It also provides for payment of legal fees.

This case highlights why British libel laws need to be modernised. The fact is that with advances in modern technology and the advent of the internet, there is the potential for any claimant to be considered to be drawn

into the British courts, no matter how tenuous the connection.

## The Draft Bill

Clause 13 of the Draft Bill is intended to deal with libel tourism. If the same (or similar) words have been also published outside the jurisdiction then,

“(2) No harmful event is to be regarded as having occurred ...unless the publication in the jurisdiction can reasonably be regarded as having caused substantial harm to the claimant’s reputation having regard to the extent of the publication elsewhere.”

The question is, what do the words quoted above actually mean? It is not clear that this clause would have altered the outcome for Ms. Ehrenfeld at all. Why? Because, it might be thought that, damage is always caused to a claimant’s reputation in the jurisdiction by publication in the jurisdiction. Moreover, given the British Court’s historic tendency to find a connection granting them jurisdiction, no matter how tenuous, the wording will definitely need to be finessed if UK defamation laws are to be considered a sensible blueprint for modern international libel laws.

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