

Bribery Act 2010

How it applies to the public sector

The public sector will not escape the scope of the Bribery Act 2010, which is scheduled to come into force later this year.

Specifically, public sector organisations can commit offences in these sections of the Act:

- Section 1 – bribing another person
- Section 2 – offences relating to being bribed
- Section 6 – bribing a foreign public official

If a public sector organisation commits any of those offences then senior officers of that organisation can be personally liable if it was committed with their consent or connivance. On conviction under the Act an individual may be sentenced to up to 10 years in prison. An organisation may be subject to an unlimited fine.

However, the new offence of a commercial organisation failing to prevent bribery (set out in Section 7) will only apply to incorporated companies and partnerships that carry on a business in the UK. The wording of Section 7 however is such that bodies created by statute as corporate bodies could fall within the scope of the offence.

It is clear, though, from Parliamentary debate and submissions made by the Ministry of Justice during the passage of the Act through Parliament, that the offence was only intended to address failures of governance systems within commercial organisations which results in bribery being used to secure a business advantage. Therefore, the offence should not apply to the majority of the public sector, including statutory bodies.

Most of the commentary on the Act has focused on the new Section 7 offence, and in particular on the defence available to an organisation if it can show that it had in place 'adequate procedures' designed to prevent bribery. The Government published guidance for consultation on what will constitute adequate procedures for the purposes of the Act.

Unfortunately, the draft guidance does not consider the definition of a commercial organisation set out in the Act, and therefore does not remove the current ambiguity of how Section 7 may apply to the public sector. In light of this lack of clarity, public sector organisations that believe they could fall within the definition should consider how the draft guidance could be adapted to reflect their own organisational structures and practices.

There is a chance that the outcome of the consultation may add some clarity to the scope of the definition and its application to different public sector bodies when published, but this is not guaranteed.

While many public authorities may not need to take any steps, they can play an important role in preventing or eliminating bribery in the private sector.

Most public authorities will already have bribery procedures in place and all authorities should include anti-corruption provisions in their public procurement and contractual documents.

Most already have strict policies in place on things like expenses, gifts and hospitality. Whilst this will help

in the prevention and detection of bribery in the public sector and where it works alongside the private sector, it will not make public bodies, or specifically their staff, immune to involvement in situations where bribery may occur. Clearly, the public sector will be expected to play its part in reporting any suspicious activity in the private sector.

To ensure public authorities are prepared for the Act, they should:

- be aware of the changes to the law that will be made when the Act comes into force
- update their procurement documentation and precedent contracts to refer to the new provisions
- consider changes to their procurement practices that they may wish to make. For example, while the Section 7 offence does not apply to public sector organisations, it would be embarrassing for a public authority if one of its contractors was found to have committed such an offence (particularly if the offence related in any way to the services being provided to or on behalf of a public authority). An explicit right to terminate a contract in these circumstances would at least show that the public authority had tried to prevent such actions and was able to deal with the breaches effectively.

Contracting authorities should note that it is not yet clear whether a conviction of an offence under Section 7 of the Act would trigger the automatic exclusion provisions set out in regulation 23 of the Public Contracts Regulation 2006 (SI 2006/05) preventing the convicted organisation from tendering for future contracts.