actually 100% accurate. We did the count!)

Seventeen years ago, then, I flew home with absolute confidence in our criminal justice system. Sure, it wasn't perfect. But just look at the alternative.

Well, it seems to me that someone did look at the alternative. And that someone shamefully saw a system to which they aspired. This is why England and Wales are closer to 'US justice' in 2021 than we have ever been.

Some would argue otherwise, of course. The Public Defender Service exists, they would say, but it has yet to take off. Most accused are still defended by the self-employed bar and by independent solicitors, they would posit. And that is true. But it is also misleading. Almost two decades of cuts have seen to it that in every other respect, those who cannot afford to pay privately for their defence now face a level of representation that - whilst still ahead of what the poorest would expect in the US - is now running America far too close. It is for this reason that I personally work so closely with private criminal defence specialists Ewing Law; because only for privately paying clients are the necessary resources still available to 'defend at all costs'.

With fees cut to the bone, publicly funded defence lawyers - both solicitors and barristers - are now working on a shoestring. Where possible they will still provide the very best representation they can; thankfully there are many still left from the 'good days' who will not allow themselves to do their job any other way. But pure determination and an understanding of professionalism can only carry them so far. With the threat of insolvency or bankruptcy hanging over far too many heads, how long can dedicated practitioners' drive to defend be expected to overcome the financial reality where - for publicity-funded work - only 'stack em high', 'volume over quality' can pay the bills?

And what about when those who knew the 'good days' are gone? When all that's left is the minuscule amount of newer recruits, lawyers who have only seen the 'bad times' and the 'bad ways'?

The direction of travel could not be clearer. Publicly-funded firms are disappearing at a shocking rate and, as sad as it is to admit this, the two-tier system already exists. All because some faceless mandarin with zero experience of a courtroom decided to emulate the US ethos of 'Justice for the Rich and Just This for Everyone Else'.

Is it too late to stop this rot? Who knows. But while some of us still remember the 'good days', should we not at least try?

Tony Wyatt, Associate Counsel at Ewing Law and best-selling crime author under the pseudonym Tony Kent

The Bribery Act: The First 10 Years

Ten years after it came into force in the UK, John Binns and Umar Azmeh of the Financial Crime team at BCL Solicitors LLP, review the performance so far of what has been called 'a landmark of legislation', including its most important innovation – the 'failure to prevent' offence.

Introduction

The Bribery Act 2010 (the **'2010 Act'**) received Royal Assent in April 2010 and came into force on 11 July 2011. Its 10th anniversary gives us a good opportunity to reflect upon the impact that it has had within the criminal justice system, with one eye to the future as it becomes more entrenched and even inspires other legislation. Whatever its effects, it is certainly clear that it modernised the UK's out-dated corruption laws, which had not been updated for almost 100 years, and which clearly struggled to deal with more modern iterations of bribery and corruption.

Background to Reform

Prior to the 2010 Act, the law of bribery comprised various common law offences, including event-specific offences such as embracery [bribing a juror], attempting to bribe a privy councillor, and attempting to bribe a police constable, along with a number

of statutory offences. The most significant statutes were the Public Bodies Corrupt Practices Act 1889 (the **'1889 Act'**), the Prevention of Corruption Act 1906 (the **'1906 Act'**), and the Prevention of Corruption Act 1916. A UK Government Consultation Paper in 2005 *(Bribery: Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials)* noted that the law was "fragmented and out of date and needs to be reformed."

The OECD had also been critical of the UK's bribery and corruption laws, describing them as being "characterised by complexity and uncertainty" (OECD Phase 2 Report *on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions).*

- Issues with the previous law (as highlighted by the Law Commission in its Consultation Paper, No.185, *Reforming Bribery* (2008)) included the following:
- **The distinction between public sector and private sector bribery:** the law drew a distinction between bribery in the public and private sectors. The 1889 Act was concerned with public sector bribery (members, officers and servants of public bodies). The

Corruption

1906 Act was concerned with general bribery of both public and private sectors actors. There was also a presumption of bribery in cases in which a public official and an individual seeking a public sector contract were engaged. Whether such a presumption, along with the public/private distinction, was necessary or desirable was open to question.

- **Incorrect statutory charges:** Although the 1889 Act was restricted to public sector bribery, it confusingly did not cover all cases of bribery where the defendant worked in the public sector.
- **Terminology:** The 1889 and 1906 Acts used different terminology.
- **Definitions:** The 1906 Act noted an agent as any person "employed by or acting for another", a definition criticised for being vague; and both the 1889 and 1906 Acts failed to define "corruptly," a term used in both statutes.
- **Extra-territorial application:** Until the Anti-Terrorism, Crime and Security Act 2001, it was not an offence for a British national or a UK-company to commit bribery abroad.

The Law Commission noted that any reform of the law ought to apply the principle of equal treatment, i.e. those in the private sector ought to be held to the same standards as those in the public sector; any new law ought to comply with the UK's international obligations; any new offence(s) must be as clear and simple as possible; any new offences must not distort the operation of other well-established offences, e.g. competition law offences; and simply immoral conduct must not be criminalised. What ought to underpin the offences were breaches of loyalty and good faith.

Prosecutions (and Deferred Prosecution Agreements) relating to the 2010 Act
One of the objectives of the 2010 Act was to pursue companies that were engaging in bribery, either actively or, effectively, by 'turning a blind eye' to prohibited behaviour. One manner in which the 2010 Act sought to do this was with the offence contrary to section 7, namely failure to prevent bribery, with a defence of adequate procedures. Prior to the 2010 Act, it was extremely difficult for a prosecutor to prove corporate criminal liability in bribery cases, due to the identification principle. The offence contrary to section 7, removes that hard requirement, along with effectively reversing the burden of proof in connection with its defence. However, far from the expected slew of corporate convictions for the offence contrary to section 7, there have only been two companies convicted of that offence: Sweett Group PLC and Skansen Interiors Limited.

Statistics within the criminal justice system are somewhat difficult to obtain. However, in 2020 and in response to a Freedom of Information request, the SFO revealed that it had taken 5 cases under the 2010 Act to Court (excluding DPAs), and in 2019 it was revealed that the Crown Prosecution Service had instituted criminal proceedings in 16 cases under the 2010 Act. Hardly the flood of cases that was perhaps envisaged as part of a revamped drive to tackle bribery and corruption

There has, however, been more success from the 2010 Act where Deferred Prosecution Agreements (**'DPAs'**) are concerned (under the Crime and Courts Act 2013). There have so far been nine DPAs that have involved the offence contrary to section 7 of the 2010 Act: Standard Bank PLC (2015); Sarclad Ltd (2016); Rolls Royce PLC and Rolls Royce Energy Systems Inc (2017); Guralp Systems Ltd (2019); Airbus SE (2020); Airline Services Ltd (2020); Amec Foster Wheeler (2021); and two involving as yet unnamed companies (2021). The total sums ordered by the Court to be paid under those DPAs exceeds £1bn.

It is worth noting that the DPA regime potentially provides the best of both worlds for companies and prosecuting authorities alike. As far as companies are concerned, they are able – even in circumstances where they would almost certainly be convicted – to admit wrongdoing and avoid a criminal conviction, with all of the negative consequences that would follow e.g. prohibitions on public procurement contract tenders, and reputational damage. Prior to the 2010 Act, the company would either have had to plead guilty or take the case to a jury – if convicted, that would have been on the basis that a 'guiding mind and will' had committed the offence. The company is effectively permitted to take a commercial decision on a potentially criminal matter. As far as the prosecutor is concerned – thus far just the SFO – it is able to pass significant investigative costs onto the company, avoid the vagaries of a jury trial which may – as it has done in the case of every individual it has prosecuted where a DPA has been awarded to a company – result in acquittal, and also obtains significant financial penalties and its costs where appropriate.

Section 7 – A Template?

In 2017, the Ministry of Justice published a Call for Evidence on Corporate Liability for Economic Crime; however, the evidence submitted in response was considered inconclusive. In November 2020, the Government asked the Law Commission to examine the issue again and to publish an Options Paper providing an assessment of different options for reform. The Law Commission intends to provide that Paper by the end of 2021. Meanwhile, the Law Commission published its Discussion Paper in June, the responses to which will influence the Options Paper.

Effectively, the central considerations of the Paper are whether, and how, the law relating to corporate criminal liability can be improved so that it appropriately captures and punishes criminal offences committed by corporations, and their directors or senior management. As part of that process, it will be considering to what extent the 'failure to prevent' offence can be applied to other types of so-called 'economic crime', such as fraud, committed by an employee and from which a company might benefit, this template has already been deployed in the Criminal Finances Act 2017 in the offence of failure to prevent the facilitation of tax evasion.

Assessing Success

Clearly, the 2010 Act has its influential supporters, and has both changed attitudes and raised revenues for HM Treasury. But perhaps its most important criteria of success are also the hardest to judge. The question of whether incidences of bribery are now more likely to face justice rather depends on whether DPAs are included within that term; otherwise, it is surely hard to make the case that they are. What about the question of whether the 2010 Act has genuinely prevented bribery? We might hope that, ten years into the life of the 2010 Act, contracts are now granted on a fair basis without the need for bribes. A cynic might doubt whether either hope is realistic; they may wonder instead whether bribery methods have simply adapted to work around corporate procedures more effectively, thus making them harder to detect.

One of the drivers for the 2010 Act, and where perhaps it has been most successful, is in changing the perception of bribery, particularly in the corporate world. Whilst the 2010 Act has not led to a torrent of prosecutions, it has brought about a sea change in how corporates consider and mitigate against bribery. This may, ultimately, be the most important change the 2010 Act has brought about.

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