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Ten Year Anniversary of the Bribery Act Part 3: A Catalyst for Change

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The Bribery Act 2010 ("the Act"), that "*excellent piece of legislation*", has addressed many of the concerns which existed before its enactment. Among other things, the Act has modernised the U.K.'s bribery laws, addressed concerns about tackling foreign bribery, introduced a corporate offence for failing to prevent bribery ("the Section 7 Offence"), and provided a clear framework for compliance. But is that the end of the story for U.K. bribery laws, and are there any areas for improvement? The corporate offence appears to have reinvigorated a conversation about corporate criminal liability and the utility of the identification principle—a topic currently under consideration by the Law Commission—but it may also have provided the model for the introduction of other corporate criminal offences and influenced lawmakers in other jurisdictions. In this, our third and final article, we ask whether the enthusiasm for replicating the 'failure to prevent' model is a good thing? We also consider whether there are aspects of the Act and its implementation which could benefit from improvement.

The failure to prevent model

In some quarters, such as the Serious Fraud Office (the "SFO"), there is an obvious desire to move away from the identification principle as the basis for establishing corporate criminal liability. In a recent opinion piece in The Times[1], the Director of the SFO, Lisa Osofsky, who has consistently raised concerns about the difficulties caused to prosecutors by the identification principle, said that "*present U.K. law enables bad behaviour because leaders can distance themselves from the actions of their company. And this can result in what I call a dangerous culture of organised irresponsibility*." The Director points out that the governance of modern global companies is often so complicated that it can make identifying responsible individuals challenging or impossible. The difficulty of prosecuting large corporate defendants was also an issue raised by the House of Lords Select Committee in its post-legislative scrutiny of the Act. In its response, the government referred to its Call for Evidence on Corporate Criminal Liability for Economic Crime. The result of that Call for Evidence was found by the government to have been inconclusive. The matter was then referred to the Law Commission. The Law Commission is in the middle of that review of corporate criminal liability and is expected to provide an Options paper by the end of the year, in which it will provide an analysis of the effectiveness of the current law and where it could be improved.

As we discussed in our second article, the 'failure to prevent' model found in the Section 7 Offence provides one such alternative. It has already appeared in the Criminal Finances Act 2017 in the form of the offence of failing to prevent the facilitation of tax evasion (the "CFA offence"). In addition, in January 2021, there was a proposed amendment to the Financial Services Act 2021 to include a corporate offence of failure to prevent economic crime. This was not put to a vote. The government opposed the amendments on the basis that the matter should be approached on a broader basis, which included the Law Commission's review, and not through sector specific legislation. This follows

a much earlier but equally relevant statement made in 2016 by the then Prime Minister David Cameron, that it was the government's intention "*to consult on extending the criminal offence of 'failure to prevent' to other economic crimes such as fraud and money laundering so that firms are properly held to account for criminal activity that takes place within them.*"[2]

In discussions about corporate criminal liability, the failure to prevent model appears to be the frontrunner. The success of the Section 7 Offence must, in part, be a result of its use in deferred prosecution agreements ("DPAs"). Seven of the ten DPAs to date have involved the failure to prevent bribery offence. Any increase in the number of corporate failure to prevent offences is also likely to increase the number of offences to which DPAs apply.

The success of the model is also attributable to the fact that it is focused on the liability of a company based on its failure to fulfil a duty to prevent certain offending, rather than the identity of an individual or individuals whose conduct can be attributed to it.

Interestingly, the Australian Law Reform Commission (the "ALRC"), which recently delivered its report into Corporate Criminal Responsibility, has recommended that there should be a standardised mechanism for attributing criminal responsibility to corporates. The recommended mechanism is the failure to prevent model with a 'reasonable precautions' defence, akin to the adequate procedures type defence available for the Section 7 Offence. In its review, the ALRC focused in particular on the development of the Section 7 Offence in the U.K. and the CFA offence.

In other countries like Italy (Legislative Decree 231) or France (Sapin II Law, article 17), similar—albeit different—systems have been put established in order to strongly encourage corporations to set up and maintain an effective internal control and compliance programme.

Ultimately, the idea behind the failure to prevent model is that it encourages good corporate governance and better business practices and corporate culture.

The ultimate objective

While there appears to be a leaning towards the failure to prevent model, it is important to consider why. Again, referring to the recent ALRC review, although the failure to prevent model is the recommended standardised mechanism, the ALRC observed that there were too many criminal offences relevant to corporations and recommended that criminal offence provisions should only apply to the "most *egregious corporate misconduct*" and all other misconduct should be subject to civil penalties. The ALRC went further and recommended that, where a proposed law does include a new criminal offence for corporations, the government should explain publicly why it is necessary.

The ALRC's recommendations bring to the fore the question whether making it easier to prosecute corporates is the objective. It is indisputable that the Section 7 Offence placed a greater compliance burden on companies—a burden more easily shouldered by larger corporations than by small and medium enterprises ("SMEs"). If the failure to prevent model is played out more broadly, it is likely to increase the burden on companies and impact business. One example is the growth of environmental, social, and governance ("ESG"), which includes aspects of doing business which are more difficult to control. Although there are currently no plans to criminalise failures in ESG standards in the U.K., the failure to prevent model may be the most attractive mechanism to do so were the question ever to arise. However, corporates are not regulators, and even larger companies may struggle to find the resources to police, for example, the supply chain. Lawmakers persuaded by the success of the Section 7 Offence under the Bribery Act should pause and consider whether increasing the criminal liability of corporates is the objective or whether civil or regulatory penalties are more appropriate, as recommended by the ALRC. The environment for doing business must not be so burdensome or hostile that it deters entrepreneurship.

Focus on foreign bribery

As we discussed in our first article, the U.K. has been under pressure from the OECD to take action to modernise its bribery laws. Prior to the introduction of the Act, the U.K. had signed up to the OECD Anti-Bribery Convention several years earlier, but had been slow to make its laws compliant with the Convention. The OECD Convention is concerned with tackling foreign bribery and the offences introduced by the Act went some way towards addressing the deficiencies. However, the question arises whether the focus has shifted too much towards foreign bribery and not enough on domestic bribery; that is, bribery which takes place in the U.K., whether by U.K. actors or foreign companies. The credibility of and the public confidence in the investigation and prosecution of offences under the Bribery Act would be strengthened by an equal focus on domestic bribery, and would avoid the impression being given that law enforcement is not tackling concerns about domestic bribery. Is there too much emphasis on foreign bribery at the expense of 'local' or domestic offending?

To date, the DPAs that have involved the failure to prevent bribery offence have involved U.K. companies who failed to prevent bribery overseas. Although the jurisdiction of the Section 7 Offence extends to any commercial organisation which carries on its business, or part of its business in any part of the U.K., regardless of where it is incorporated or formed, giving the provision a wide extraterritorial effect. There appears to be no case in which this wider jurisdiction has been exercised.

Finally, one of the issues raised by the OECD Working Group, which has yet to be addressed, is compliance with Article 5 of the OECD Convention, which, in summary, provides that the investigation and prosecution of foreign public officials should not be influenced by political concerns, namely considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal persons involved. This provision has an obvious relevance to Bribery Act offences. The Working Group recommended that Article 5 is made legally binding on investigators, prosecutors, the Attorney General, and the Lord Advocate in Scotland at all stages of an investigation and prosecution. The U.K. has, so far, responded that it does not consider that any further action is required in relation to this recommendation as the independence of prosecutors in the U.K. is well established, and existing safeguards ensure that decisions are independent and free from undue influence. The Working Group has been left recommending that steps are taken to ensure that the principle in Article 5 are respected.

Levelling the playing field

Despite the glowing praise for the Act and the Section 7 Offence, one of the criticisms of its operation is that it creates an uneven playing field, SMEs do not have the same resources available to larger companies to put in place sophisticated anti-bribery compliance measures, and are, therefore, more likely to be in breach of the Act. As a result, they are also more likely to be at risk of prosecution. The post-legislative scrutiny of the Act recognised the difficulties which may be faced by SMEs and recommended that the government improve its communication with SMEs and took steps to ensure they were better informed of the statutory guidance to the Act.

The government, in its response to the post-legislative scrutiny, recognised the difficulties faced by some SMEs and undertook to raise awareness of the issue of bribery and compliance with the Act. The government also referred to the Department of International Trade website, which it said provides market specific information and undertook to improve the content and tools.

There are likely to be no special rules for SMEs, but it may be that in any consideration of whether to charge an SME with a Section 7 Offence, or in any potential criminal proceedings the question of what procedures are 'adequate' will involve a consideration of the size and operations of the company.

In order to overcome the problem of the unequal treatment of larger corporations and SMEs, the ALRC recommended a move away from its equivalent to the identification principle, namely the need to identify a "high managerial agent" and to introduce a much lower basis for culpability, namely that a corporation should be considered at fault where an employee, officer, or agent of the corporation has the relevant state of mind for a particular offence.

Slow investigations

Although the Act modernised the U.K.'s anti-bribery laws, it does not appear to have resulted in speedier investigations. It is not unusual for an investigation to continue for several years before it is finally resolved. There are several instances where the investigation has taken eight years and, in one case, an investigation which began in 2013 is still ongoing without any charging decision having been made.

In October 2019, HM Crown Prosecution Service Inspectorate (the "HMCPSI") published a report on case progression in the SFO. It recognised that the majority of cases the SFO deals with are huge, complex matters, which can involve huge volumes of data and usually features an international element. HMCPSI found that a key concern was the time it took for cases to reach a conclusion. It identified factors which might contribute to the delay, such as the time it took to allocate a case to a team and the delay in processing digital material the case team need to investigate.

As observed by the OECD in its Phase 4 Report, the SFO's stated purpose since its creation in 1988 has been to investigate and prosecute serious or complex fraud and corruption and to help maintain confidence in the U.K.'s business and financial institutions.[3] In its reports, the OECD looks at the number of cases opened, resolved, and ongoing.

The average SFO investigation takes a number of years before a conclusion is reached. HMCPSI made a number of recommendation to make the SFO's management of cases more efficient and effective. It may be too early, particularly in light of the intervening pandemic, to measure whether any of the recommended measures will have the desired effect. A more efficient SFO will create space for a larger number of investigations, perhaps including a greater number concerned with domestic bribery.

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1 We're defending the U.K. as a safe place for business | Business | The Times

2 The fight against corruption begins with political will | David Cameron | The Guardian

3 *U.K.-Phase-4-Report-ENG.pdf (oecd.org)

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