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The New Offence of Failure to Prevent Fraud: Key Steps to Preparedness

Solve: Interactive & Solve: Immersive

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What is the offence?

The new corporate offence, which comes into force on 1st September 2025, will hold organisations accountable for fraud committed by their employees, agents, subsidiaries or other ‘associated persons’ who provide services for or on behalf of the organisation, where the fraud was committed with the intention of benefiting the organisation or its clients (even if such benefit was not the only or main motivation).

Importantly, it does not have to be proved that the organisation actually did benefit, nor does it even have to be proved that the organisation’s senior executives or directors ordered, or knew about, the fraud.

Moreover, the Home Office Guidance makes clear that the organisation can be prosecuted where the associated person’s conduct constitutes a base fraud offence, even if the associated person is prosecuted for a different offence or not actually prosecuted at all.

In the case of a subsidiary, it will be possible to prosecute a parent company where the base fraud offence is committed by the subsidiary and the benefit is to the parent organisation or its clients to whom the subsidiary provides services for or on behalf of the parent organisation.

Who will be caught by the new offence?

The offence of failure to prevent fraud is solely applicable to large organisations. The definition of a ‘large organisation’ is one that meets at least two of the following criteria (in the financial year of the organisation that precedes the year of the base offence):

- Employing more than 250 employees;
- Having a turnover of more than £36 million turnover;
- Having more than £18 million in total assets.

It should be noted that the criteria apply to the whole organisation, including subsidiaries, regardless of where the organisation is headquartered or where its subsidiaries are located.

Is there a jurisdictional limitation?

In the wake of the UK's Bribery Act, the new offence has a very broad jurisdictional reach. The key requirement is that there is a UK nexus, which, in this context, means that one of the acts which was part of the base fraud took place in the UK, or that that the gain or loss occurred in the UK. An organisation can therefore be liable no matter where it is based or incorporated.

Is there a defence?

There is a limited statutory defence, which would require an organisation to prove that it has reasonable procedures in place to prevent fraud, or if it can demonstrate to the satisfaction of a court that it was not reasonable in all the circumstances to expect it to have any prevention procedures in place.

A word of caution is necessary here: The Home Office Guidance states, perhaps ominously, that:
The question of whether a relevant organisation had reasonable procedures in place to prevent fraud in the context of a particular prosecution is a matter that can only be resolved by the courts, taking into account the particular facts and circumstances of the case.

This suggests that, where the failure to prevent offence is made out but the organisation has adduced evidence to demonstrate the procedures it has in place, prosecutors are likely to be slow to drop a case and more inclined to leave the matter to the court.

As far as the defence itself is concerned, just like the failure to prevent bribery and the facilitation of tax evasion offences, the question of whether procedures are indeed 'reasonable' will be centred around six principles:

- Top level commitment
- Risk assessment
- Proportionate risk-based prevention procedures
- Due diligence
- Communication (including training)
- Monitoring and review

It is worth immediately recognising that 'top level commitment' has now been placed as the first principle, an indication, no doubt, of the importance that will be placed on examining the efforts made by senior management. The Home Office Guidance identifies the key components of 'top level commitment thus:

- Communication and endorsement of the organisation's stance on preventing fraud;
- Ensuring that there is clear governance across the organisation in respect of the fraud prevention framework;
- Commitment to training and resource.

Further, one might reasonably add the sixth principle, 'Monitoring and Review', as another C-suite 'must ensure'. Indeed, under the UK Corporate Governance Code, boards of large companies are expected to carry out a robust assessment of emerging and principal risks and to report on that work, along with reviewing and monitoring all material controls (including financial, operational and compliance controls).

How can we help?

We provide a creative, innovative and yet cost-effective, approach that we have successfully used across a wide range of sectors in the UK and abroad. We will work with you to:

- Stress-test existing corporate procedures and governance, and arrive at any required changes
- Enhance board, compliance, legal and risk decision-making
- Ensure critical incident and crisis preparedness
- Enhance departmental collaboration and partner liaison
- Provide targeted practical and experiential training

How do we deliver?

The 'Solve' methodology

Solve: Immersive aims to create a safe, experiential learning environment through recreating the complexity, chaos and challenge of a true to life incident or situation. The 'scenario' is developed in consultation with the client to capture key issues and themes. The provider's team then draws up the factual narrative and appropriate feeds (such as video, audio, documentary, email, social media etc.), aiming to be as realistic as possible in order to allow the participants maximum benefit and learning. Our scenarios are not ‘table top’ paper exercises, but rather a framework for a multi-media storyline that has decision-making, governance, accountability and risk management at its core.

Each phase of the emerging scenario requires participants to make real time decisions which must be recorded, within the session allocated time, onto the system with a ‘thought through’ rationale that underlies the decision; once that decision is made, as in real life, the group must work through the resultant consequences.

At important stages in the exercise, the facilitators will hold debriefing sessions to work through the decisions made and analyse critically each of the decision-making strands. Such sessions are deliberately intensive and challenging so as to provide the maximum learning experience.

Alongside **Solve: Immersive** sits **Solve: Interactive**, a powerful a pre-/debriefing method with which to gain an open, unbiased insight into the understanding and thoughts of staff at all levels. At its heart is the ability to fully anonymise those participating in order to allow for an honest, frank and open ‘discussion’ without inhibition. Such an approach helps to identify any gaps and issues facing the organisation and leads to the development of processes, procedures and training programmes that are fit for purpose and truly reflective of the organisation’s values.

THE TEAM

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Martin Polaine is one of the directors of Amicus, a practising barrister (as a member of Brooke Chambers) of more than 35 years' experience, a Senior Consultant at H & H Lawyers (Sydney & Melbourne) and an arbitrator. He is a Fellow of the Chartered Institute of Arbitrators (FCIArb) and a Fellow of the Asian Institute of Alternative Dispute Resolution (FAIADR).

Martin is an experienced trainer, facilitator and crisis preparedness professional. He is a hands-on designer and facilitator of Solve workshops and has, since the late 1990s, conducted well over 200 exercises globally on a wide range of topic areas.

He has an established reputation in corporate compliance/regulatory and acts as a legal reviewer for regulatory guidance produced by Lexis Nexis.

Martin is also a Teaching Fellow at the College of Law (Sydney), where he tutors postgraduates in 'International Arbitration & ADR', 'International Trade & Investment Law', 'Banking & Finance', 'Capital Markets' and 'Intellectual Property'.

His publications include co-authorship of 'Corruption & Misuse of Public Office' (1st edition, Oxford) and of 'Counter-Terrorism Law and Practice: An International Handbook' (Oxford), as well as numerous manuals and papers in his specialist fields.

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Arvinder Sambei is one of the directors of Amicus and is also practising barrister (as a member of Brooke Chambers) of more than 35 years' experience.

Arvinder is an experienced facilitator and trainer, and is regularly instructed to design and deliver training, capacity building and technical assistance seminars and workshop on behalf of international organisations, law firms and corporates on compliance/risk, anti-corruption/fraud and corporate governance.

Along with other members of Amicus, she develops and delivers immersive crisis prevention and management exercises and anonymised debriefing for businesses (of all sizes) to enhance critical incident/crisis preparedness and response. Arvinder has a particular interest in devising procedure and regulatory stress-testing that encourages clients to take a holistic approach that encompasses risk identification/management, decision-making, communication and reputation safeguarding.

Her publications include co-authorship of the 'Extradition Law Handbook' (Oxford) and 'Counter Terrorism Law & Practice: An International Handbook' (Oxford), contributing authorship of 'The Extradition and Mutual Legal Assistance Handbook' (Oxford), and numerous papers in her specialist fields.

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