

The Bribery Act 2010 – A Briefing

1 Introduction

The Bribery Act 2010 came into force on 1st July this year. It modernises the law on bribery. Prior to the Act, UK bribery law was a patchwork of old common law and statutory offences dating back to 1889.

Part of the driving force behind the implementation of the Act was the fact that it was very difficult for a corporate entity to be convicted of a bribery offence because of the need to prove that a senior manager was the "directing mind and will" behind the offence.

2 Offences under the Act

Bribing (s1)

It will be an offence to offer, promise or give a financial or other advantage with the intention of inducing that person to perform improperly a '**relevant function or activity**' or to reward that person for doing so.

It will also be an offence to offer, promise or give a financial or other advantage where the person doing so 'knows or believes' that the acceptance of the advantage would itself constitute the improper performance of a '**relevant function or activity**'.

In both cases, it does not matter whether the advantage is offered, promised or given directly or through a third party.

The offence applies to bribery relating to **any function of a public nature**, connected with a business, performed in the course of a person's employment or performed on behalf of a company or another body or persons.

Being bribed (s.2)

It will be an offence to agree to request, receive or accept a financial or other advantage with the intention that a '**relevant function or activity**' should be performed improperly and it does not matter whether the advantage is received directly or through a third party.

Bribery of a foreign official (s.6)

Failure to prevent bribery (s.7)

A commercial organisation which fails to prevent bribery commits a strict liability offence which carries a statutory defence available if the organisation has in place appropriate/adequate procedures to counter the potential problem. (s.9).

3 Who may be liable for the offences?

Individuals may be liable for any offence falling within sections, 1, 2 or 6. These are criminal offences and may be tried either in the Magistrates' Court or the Crown Court – depending on the severity of the allegation.

'Commercial organisations' are expressly liable for offences under section 7 (and by implication if the facts are applicable, by association under sections 1, 2, and 6.)

'Commercial organisations' are defined as incorporated bodies and partnerships. The company or partnership must be carrying on a 'business' or part of a business. 'Business' is defined as a trade or profession.

4 How will this affect the Council its members and officers ?

The Council:- s. 1 of the Act confirms that 'bribery' relates to any function of a public nature, connected with a business, performed in the course of a person's employment or performed on behalf of a company or another body or persons. So this could potentially mean that an organisation may be guilty of an offence when bribery is committed by its staff, contractors and even sub-contractors. Consequently, the safest course is to assume that Councils could be liable under the Act for failing to prevent bribery and to implement adequate procedures to safeguard against it.

Members and officers:- The offence of bribing and / or being bribed may be committed by members and officers. This can be directly or indirectly by means of third parties.

5 Managing the risk.

The offence of failure to prevent bribery is a strict liability offence. However there is a statutory defence which is reproduced in statutory guidance.

The Guidance states that organisations wishing to avoid liability for the offence of failing to prevent bribery need to put in place procedures which demonstrate that they comply with six express principles set out and explained in the Guidance which is available at

<http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>)

The Guidance sets out commonsense and practical advice. Set out below is a summary of the six principles. It is fundamental that bribery prevention procedures should be proportionate to the risk they are seeking to minimise.

1. Proportionate Procedures .
2. Top level commitment
3. Risk Assessment
4. Due Diligence
5. Communication (including training)
6. Monitor and review

It is clear from the Guidance that if an organisation wishes to rely on the defence, then it must develop a policy to prevent bribery and implement proportionate, robust procedures to minimise the risk of bribery. This policy and the procedures must be kept up to date and be communicated to members and officers alike.

6 Effect on Procurement of a section 7 offence:-

Under the Public Contracts Regulations 2006, a company is automatically and perpetually debarred from competing for public contracts where it has been convicted of a corruption offence. The Government has stated that there are no plans to amend the 2006 regulations for this to expressly include the corporate offence of failure to prevent bribery. Organisations that are convicted of failing to prevent bribery are therefore not automatically barred from participating in tenders for public contracts; however the Council has a clear discretion to exclude organisations convicted of this offence.

It is suggested that the Council's template pre-qualification questionnaire and Invitation to Tender be amended to include a specific question on whether a bidder has been found guilty of a section 7 offence, with the Council reserving the discretion to exclude any bidder convicted of such an offence.

7 Next steps

The Council already does much to ensure that its decisions and actions are properly based and avoid the possibility of corruption. However, there is a need for the Council to reflect this new legislation in existing documents such as the anti-fraud and corruption policy, its constitution and codes of conduct, whistle-blowing procedures, anti-money laundering practice and gifts & hospitality procedures. Officers and Members alike need to be made aware of the additional new offences created by the Act.

The following actions are proposed:-

- (1) Draft bribery policy and refer it to EMT.

- (2) Amend key Council documents through appropriate channels
- (3) Amend procurement documents and guidance for contractors
- (4) Provide training for officers in key positions (procurement staff/audit/legal etc – scheduled for August 2011)
- (5) Provide briefing for all members
- (6) Monitor and review bribery policy as part of annual review of corporate governance.