

Chichester District Council

STANDARDS COMMITTEE

6 June 2011

Bribery Act 2010

1. Contacts

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2. Executive Summary

The Bribery Act 2010 received royal assent on 8 April 2010. It has not yet come into force but indications are that July 2011 is the most likely date. This report outlines the main provisions of the Bribery Act 2010 and the main strands of the recently published guidance. It is reported to Standards Committee for its information, its provisions would cover members as well as officers.

3. Main Report

Purpose of Report

- 3.1 The Bribery Act 2010 received royal assent on 8 April 2010. It is likely to come into force in July 2011, much later than originally anticipated. Commencement follows a consultation exercise on key guidance issued under the Act by the Ministry of Justice which closed on 8 November 2010.
- 3.2 The Guidance aims to provide direction about procedures that organisations can put in place to prevent bribery on their behalf.
- 3.3 This report outlines the main provisions of the Bribery Act. The Guidance has now been finalised, on target for a July 2011 implementation date. The Council will take any steps considered necessary to update existing policies and procedures and to embed these within the organisation.

Bribery Act 2010

- 3.4 The Bribery Act 2010 aims to reform the criminal law to provide a new, modern and comprehensive scheme of bribery offences. It will replace the fragmented and complex offences at common law as well as various statutory offences dating back to 1889-1916.

3.5 The Act creates four new offences:

1. Offences of bribing Another Person (Section 1)

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.

In the local authority context, a function or activity will be a "relevant function or activity" for the purposes of the Act if it is of a public nature and a person performing it is expected either (a) to perform it in good faith, (b) to perform it impartially or (c) the person is in a position of trust by virtue of performing it. If the function/activity is caught under one of these tests, then the Act states that it will be "improperly performed" if there is a breach of a "relevant expectation". This "expectation" is itself an objective test of what a reasonable person in the UK would expect in relation to the function/activity.

2. Offences relating to being bribed (Section 2)

This offence is relevant to a number of prescribed cases but in essence 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.

This will be of particular relevance to the Council.

3. Bribery of a foreign public official (Section 6) ie with the intention of influencing a public official in his foreign capacity.

It is not likely this offence will be relevant to the Council.

4. Failure of commercial organisations to prevent bribery (Section 7)

The Act creates a new offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf. For the purposes of the Act a relevant commercial organisation means a body corporate or partnership which carries on a business or part of a business. Business is defined as a trade or profession. It is a defence if the organisation has adequate procedures in place to prevent bribery. In general, a public body would not be a commercial organisation for the purposes of the Act. However, a Council could have subsidiaries which would come under the scope of the Act or it may carry out activities which are akin to running a private business.

In any event the Council will review its policies and procedures in light of the Act to ensure that they are adequate in relation to those offences that could affect the Council, and to minimise risk.

- 3.6 The Act makes it clear that if the bribery offence is committed with the consent/connivance of a senior officer of the local authority, then that person is also personally guilty of an offence. This will potentially catch all those working at manager level and upwards. Penalties under the Act include fines and/or imprisonment for up to ten years (for the more serious offences).

Guidance

- 3.7 Section 9 of the Bribery Act requires the Secretary of State to publish guidance about anti-bribery procedures in respect of the offence under Section 7. The final version of the Guidance has now been published.

- 3.8 The Guidance sets out six principles that are intended to inform all commercial organisations wishing to prevent bribery on their behalf. These are designed to be outcome focused and flexible to allow organisations to tailor them to the nature, scale and complexity of their activities.

3.9 **Principle 1: Proportionate procedures**

A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear practical, accessible, effectively implemented and enforced.

It is suggested such documentation include:

- a clear prohibition of all forms of bribery including a strategy for building this prohibition into the decision making processes of the organisation;
- guidance on making, directly or indirectly, political and charitable contributions, gifts, and appropriate levels and manner of provision of bona fide hospitality or promotional expenses to ensure that the purposes of such expenditure are ethically sound and transparent;
- advice on relevant laws and regulations;
- guidance on what action should be taken when faced with blackmail or extortion, including a clear escalation process;
- The organisation's level of commitment to the Public Interest Disclosure Act 1998 (employment law protection for whistle-blowers) and an explanation of the process;
- Information on anti-corruption programmes relevant to the sector.

Is also suggests organisations may also wish to consider issuing a code of conduct, which sets out expected standards of behaviour and which can form part of the employment contract.

Consideration should also be given to how existing procedures can be used for bribery prevention purposes such as financial and auditing controls, disciplinary procedures, performance appraisals and selection criteria.

3.10 **Principle 2: Top level commitment**

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Emphasis is placed on top level management fostering a culture of integrity where bribery is unacceptable in the organisation. Organisations should make an appropriate statement to that effect as a kind of 'statement of commitment to counter bribery in all parts of the organisations operation'. This may be made public and be communicated to subsidiaries and business partners. In addition implications of breaching the regime should be communicated to employees (and in the Council's context also Members).

The guidance suggests the appointment of a senior manager to oversee development of an anti-bribery programme.

3.11 **Principle 3: Risk Assessment**

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

The Guidance notes that an organisation must regularly assess and understand the risks of corruption that it faces and undertake a continuous evolving risk assessment process.

The Guidance divides assessment of risks into:

Internal risks. For example, employee knowledge and understanding of bribery risks, deficiencies in employee training or skill sets, remuneration structures and policies on gifts, entertaining and travel expenses.

External risks. These include, for example:

- Transaction risks, such as charitable and political contributions, obtaining licences and permits and other approvals, public

procurement, high value projects or projects with many contractors or involvement of intermediaries or agents.

- Partnership risks, which include engaging business partners located in higher risk jurisdictions with prominent public office holders, insufficient knowledge or transparency of third party processes and controls.

3.12 **Principle 4: Due diligence**

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

This is about undertaking due diligence to know who you are doing business with and to identify bribery risks associated with a particular business relationship. Key here for the Council will be due diligence undertaken through the procurement process. Relevant factors identified in the guidance concern location i.e. the jurisdiction companies are operating within; business opportunities for example whether a project is to be undertaken at market prices or has a defined legitimate objective and specification; identifying whether business partners have any history of bribery or corruption including convictions and checking their internal anti-corruption measures.

3.13 **Principle 5: Communication (including training)**

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

It is suggested larger organisations adopt an implementation strategy setting out who will be responsible for implementation; how policies and procedures will be communicated internally and externally; the nature of training and how it will be rolled out (it is suggested business partners also be considered); the internal reporting of progress to top management; the extent to which external assurance process will be engaged; the arrangements for monitoring compliance; the timescale of implementation; a clear statement of the penalties for breaches of agreed policies and procedures; and the date of the next review.

3.14 **Principle 6: Monitoring and review**

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

It is suggested that in larger organisations this might include financial monitoring, bribery reporting and incident management procedures. In addition, for example, periodic reporting of the result of such reviews to the Audit Committee, the Board of Directors or equivalent body is also recommended. In turn, the Audit Committee, Board or equivalent body may wish to make an independent assessment of the adequacy of anti-bribery policies and disclose their findings and recommendations for improvement in the organisation's Annual Report to shareholders. In the Council's case this would be the Corporate Governance and Audit Committee. It is also suggested that larger organisations should consider the need for external verification or assurance of the anti-bribery regime.

4. Council Procedures

- 4.1 The Standards Committee has been presented with a separate report on the Localism Bill. If those provisions are fully implemented as they stand and the Council decides to maintain a code of conduct for members in one form or another then given the degree of flexibility as to its content it may be prudent to ensure standards of conduct expected in respect of the Council's obligations under the Bribery Act 2010 are explicitly covered.
- 4.2 The Council deals with a number of external business partners and will need to ensure that it has measures in place to ensure compliance with the Act and that it carries out appropriate due diligence to identify risk of corruption. It is anticipated that the Office of Government Commerce ('OGC') will be updating the standard boilerplate clauses to reflect the new provisions in the Act. Contract documentation will be updated accordingly.