

ROTHERHAM BOROUGH COUNCIL - REPORT TO MEMBERS

1.	Meeting:	Standards Committee
2.	Date:	10 November 2011
3.	Title:	Bribery Act 2010
4.	Directorate:	Chief Executive's Directorate

5. Summary

Introduction

The Bribery Act 2010 came into force on 1st July 2011 and consolidated the law on bribery. It replaced the offences at common law and under the Prevention of Corruption Acts 1889 – 1916 with two general offences: the first deals with bribery and the second deals with being bribed. The basis of a bribe is an intention to induce improper conduct.

The Bribery Act is not concerned with fraud, theft, books and record offences, Companies Act offences, money laundering offences or competition law.

A bribe has three elements: (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent.

Offences

The 2010 Act creates offences of –

- offering, promising or giving of a bribe (active bribery) and the requesting, agreeing to receive or accepting of a bribe (passive bribery);
- bribery of foreign public officials; and
- failure to prevent a bribe being paid on an organisation's behalf.

Active and passive bribes

A person commits an offence (i) by offering, promising or giving a financial or other advantage to another person where he intends to bring about the improper performance by another person of a relevant function or activity or to reward such improper performance; or (ii) he knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function.

“Improper performance” means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. The offence applies to both the public and private sector, including 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 another company or another body of persons.

In deciding whether a function or activity has been performed improperly, the test is what a reasonable person in the UK would expect in relation to the performance of that function or activity.

Failure to prevent a bribe

Failure to prevent a bribe is a new offence which can be committed by commercial organisations, which includes for this purpose a local authority. The offence is committed where a person associated with the organisation bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation.

An organisation has a defence however if it can prove on the balance of probability that despite an incident of bribery it had adequate procedures in place to prevent persons associated with it from bribing.

A person is associated with an organisation where the person “performs services” for or on behalf of the organisation. The word “person” is given a broad meaning and may be an individual, a company or unincorporated association, such as a community group. Agents and subsidiaries are included as well as employees who are presumed to be performing services for their employer.

The question of association is however ultimately to be determined from all of the relevant circumstances and not simply by reference to the nature of the relationship between the person concerned and the organisation.

Consequently, contractors could be “associated” persons when performing services on the organisation’s behalf, and in certain circumstances suppliers could be too if they are providing services and not just supplying goods.

In the case of supply chains involving several organisations, or a contract with a main contractor and several sub-contractors, the Act’s reach is considered to extend no further than immediate contractual relationships. The risk inherent in such arrangements may be mitigated however by requesting the counterpart of each party in the chain to adopt a similar approach to bribery prevention with its counterpart.

The new offence is in addition to the other bribery offences that may be committed by persons who are running an organisation and considered to be the “directing mind” or will of the organisation.

In order to be liable for failure to prevent a bribe, an organisation must have failed to prevent conduct that would be an active or passive bribe, but a person need not have been convicted of an active or passive bribe before the offence of failing to prevent such conduct is engaged. Nevertheless, the prosecution must still be able to prove beyond reasonable doubt an active or passive bribery offence before the failure offence is triggered.

Whether an organisation's bribery prevention procedures are adequate depends on the facts of each case, including consideration of the level of control over the activities of the associated person and the degree of risk that requires mitigation.

Guidance

At the heart of the Act is the core principle of proportionality, which essentially requires an organisation to have in place procedures that are proportional to the level of risk of bribery that it faces.

Guidance issued by the Secretary of State for Justice under the Act contains details of procedures an organisation can put in place to prevent bribing on its behalf. These are informed by six principles, which are set out at Appendix A to this report.

Rotherham Borough Council

The Council has a number of measures in place designed to prevent incidents of bribery and fraud all of which embrace the Secretary of State's six principles. Internal Audit colleagues are currently updating the Council's Anti-fraud Strategy & Corruption Policy to reflect the requirements of the Act and will be making certain recommendations to the Audit Committee shortly. In addition to the anti-fraud policy, there are a number of other council documents that will require updating, for example Standing Orders, Financial Regulations, the Code of Official Conduct and model contract clauses.

6. Recommendations

IT IS RECOMMENDED that –

- 1. Members are requested to note this report.**
- 2. Members are requested to approve the monitoring officer and internal audit manager devising and implementing a joint programme of work to refresh and update council documents and procedures in light of the coming into force of the Bribery Act 2010 and guidance on the Act published by the Secretary of State for Justice.**
- 3. Members are requested to approve referral of this report to the Audit Committee.**

7. Proposals and details

Please see paragraph 5.

8. Finance

Other than officer time, there are no direct financial implications from this report.

9 Risks and Uncertainties

Having properly documented policies and procedures to guard against bribery reduces the risk of the Council being found to have failed to prevent bribery.

10 Policy and Performance Agenda Implications

Guarding against incidents of bribery safeguards the use of public funds and accords with the Council's Corporate Plan and Community Strategy.

11 Background Papers and Consultation

Bribery Act 2010

Guidance on the 2010 Act published by the Secretary of State for Justice

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APPENDIX

The Bribery Act 2010

Guidance of Secretary of State for Justice

Principles

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.

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.

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.

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.

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.

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.