

## **Hampshire Fire and Rescue Authority**

### **Standards Committee**

**Item 6**

**16 June 2011**

### **The Bribery Act 2010**

### **Report of the Clerk**

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## **1. Summary**

- 1.1 There is a strong emphasis in the Bribery Act 2010 on being proactive and avoiding the conditions of bribery (very generally defined as giving someone a financial or other advantage to encourage that person to perform their functions or activities improperly or to reward that person for having already done so). This raises issues of policy, awareness and compliance for organisations.
- 1.2 A body corporate can be liable if a senior person in the organisation commits a bribery offence. This person's activities would then be attributed to the organisation. A commercial organisation can be liable where someone who performs services for it, like an employee or agent, pays a bribe specifically to get business, keep business or gain a business advantage for the organisation. The organisation will have a full defence for this particular offence, and can avoid prosecution, if it can show that it had adequate procedures in place to prevent bribery (discussed further below).
- 1.3 Section 9 of the Act requires the Secretary of State to publish guidance about procedures which commercial organisations can put in place to prevent persons associated with them from bribing and the Ministry of Justice has now published guidance on this ("the Guidance").

## **2. Recommendation**

- 2.1 That the implications of the provisions of the Bribery Act 2010 are noted and that the Committee endorse the action being taken to:
  - review risk areas and determine what, if any, bribery prevention procedures should be adopted;
  - review tendering and contracting arrangements to ensure that these contain anti-corruption provisions which adequately address the provisions of the Act;

- remind members and officers of the provisions of the Code of Conduct on gifts and hospitality; and
  - implement any changes necessary to ensure compliance with the Act
- 2.2 That a further report is brought to the Committee in due course outlining any changes made.

### **3. The Bribery Act 2010**

3.1 The Bribery Act 2010 (“the Act”) comes into force on 1 July 2011. The Act creates offences of offering or receiving bribes, bribery of foreign public officials and of failure to prevent a bribe being paid on an organisation’s behalf:

- Section 1 (Offences of bribing another person):

An offence is committed if a person ('P') offers, promises or gives a financial or other advantage to another intending the advantage to induce or reward the improper performance of a function or activity. It is also an offence where P knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.

- Section 2 (Offences relating to being bribed):

An offence is committed if a person requests, agrees to receive or accepts a financial or other advantage from another, intending the advantage to be rewarded by the improper performance of a function or activity.

- Section 6 (Bribery of foreign public officials):

A specific offence of directly or indirectly offering, promising or giving a bribe to a foreign public official. To commit this offence a person must intend the bribe to influence the actions of the foreign public official.

- Section 7 (failure of commercial organisations to prevent bribery):

This offence is based on the failure by a commercial organisation to prevent bribery by people acting on its behalf. A relevant commercial organisation is guilty of an offence if any person associated with it bribes another person, intending to obtain or retain business or an advantage in the conduct of business for the commercial organisation. The Act includes a defence if the organisation can demonstrate (a reverse burden of proof) on the balance of probabilities that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent the bribe. The section 7 offence is discussed further below.

- 3.2 In relation to the offences in Sections 1 and 2, the term “improper performance” means, in summary, 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 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 of persons. Therefore, bribery in both the public and private sectors is covered. For the purposes of deciding whether a function or activity is being performed improperly, the test of what is expected is a test of what a reasonable person in the UK would expect in relation to the performance of that function or activity.
- 3.3 By virtue of section 14 of the Act, where an offence under section 1, 2 or 6 is committed, and it is proved to have been committed with the consent or connivance of a senior officer of a body corporate, or a person purporting to act in such a capacity, then an offence is committed by both the senior officer and the body corporate. “Senior officer” means in relation to a body corporate, a director, manager, secretary or other similar officer of the organisation. This provision does impact on Hampshire Fire and Rescue Authority.
- 3.4 The Section 7 offence is in addition to and does not displace liability which might arise under Sections 1 or 6 of the Act where the commercial organisation itself commits an offence under one or both of these sections.
- 3.6 The government does not intend that genuine hospitality, promotional or other business expenditure that is reasonable and proportionate be caught by the Act. However, the Guidance makes clear that facilitation payments, which are payments to induce officials to perform routine functions they are otherwise obliged to perform, are bribes and are therefore covered by the Act.
- 3.7 The Act’s penalties are severe. Any individual found guilty of offences under Sections 1, 2 or 6 is liable to imprisonment for up to 12 months for a summary conviction and up to 10 years (if convicted on indictment), a fine or both. The penalty for the corporate offence where an organisation fails to prevent one of its employees bribing or receiving a bribe is an unlimited fine.

#### **4. The Section 7 Offence**

- 4.1 As indicated, the Act creates a new offence under Section 7 whereby a commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation. The commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to

prove the defence, in the event it was prosecuted, is the balance of probabilities.

- 4.2 A “relevant commercial organisation” is defined in the Act as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation. The key concept here is that of an organisation which “carries on a business”. The Guidance states that the government expects that whether such a body or partnership can be said to be carrying on a business will be answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.
- 4.3 A commercial organisation is liable under Section 7 if a person “associated” with it bribes another person intending to obtain or retain business or a business advantage for the organisation. A person associated with a commercial organisation is defined at Section 8 as a person who “performs services” for or on behalf of the organisation. This person can be an individual or an incorporated or an unincorporated body. Section 8 provides that the capacity in which a person performs services for or on behalf of the organisation does not matter, so employees (who are presumed to be performing services for their employer) agents and subsidiaries are included. Therefore contractors could be “associated persons” to the extent that they are performing services for or on behalf of a commercial organisation. Also, where a supplier can properly be said to be performing services for a commercial organisation rather than simply acting as the seller of goods, it may also be an associated person.
- 4.4 Further clarification is required as to whether Fire and Rescue Authorities may themselves be considered to be relevant commercial organisations. However, the Section 7 offence has potential applicability to any incorporated business in which a Fire and Rescue Authority has an interest, whether it is wholly owned by the Authority or in partnership with private companies or within private finance initiative arrangements. By way of example, this provision is likely to have applied to the regional control companies established by Fire and Rescue Authorities, although these are currently in the course of winding-up. It is essential for these organisations and, it would seem good practice for the Fire and Rescue Authority itself, to implement the suggestions of the Guidance in respect of adequate bribery prevention procedures.

## **5 “Adequate Bribery Prevention Procedures”**

- 5.1 The question of adequacy of bribery prevention procedures will depend in the final analysis on the facts of each case, including matters such as the level of control over the activities of the associated person and the

degree of risk that requires mitigation. The government considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles. The principles are not prescriptive and are intended to be flexible and outcome focused and bribery prevention procedures should be proportionate to risk. The Guidance states that although commercial organisations with entirely domestic operations may require bribery prevention procedures, the government believes that as a general proposition they will face lower risks of bribery on their behalf by associated persons than those that operate in foreign markets. The six principles are as follows:

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.”*

An initial assessment of risk across the organisation is therefore a necessary first step. The Guidance advises that an organisation should consider including in its bribery prevention policies its commitment to bribery prevention, its general approach to mitigation of specific bribery risks (such as those arising from the conduct of intermediaries and agents or those associated with hospitality and promotional expenditure, facilitation payments or political and charitable donations or contributions) and an overview of its strategy to implement its bribery prevention policy. The Guidance includes an indicative (but not exhaustive) list of the topics that bribery prevention procedures might embrace depending on the particular risks faced and these are as follows:

- The involvement of the organisation’s top level management
- Risk assessment procedures
- Due diligence of existing or prospective associated persons
- The provision of gifts, hospitality and promotional expenditure; charitable and political donations; or demands for facilitation payments
- Direct and indirect employment, including recruitment, terms and conditions, disciplinary action and remuneration
- Governance of business relationships with all other associated persons including pre and post contractual agreements
- Financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure

- Transparency of transactions and disclosure of information
- Decision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest
- Enforcement, detailing discipline processes and sanctions for breaches of the organisation's anti bribery rules
- The reporting of bribery including "speak up" or whistle blowing" procedures
- The detail of the process by which the organisation plans to implement its bribery prevention procedures, for example, how its policy will be applied to individual projects and to different parts of the organisation
- The communication of the organisation's policies and procedures, and training in their application
- The monitoring, review and evaluation of bribery prevention procedures

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."*

In terms of procedures, the Guidance advises that top level management commitment to bribery prevention is likely to include (1) internal and external communication of the commitment to zero tolerance to bribery, and (2) an appropriate degree of involvement in developing bribery prevention procedures. The Guidance also advises that top-level engagement in bribery prevention will be likely to include, amongst other things, leadership on key matters such as a code of conduct, awareness raising, assurance of risk assessment and engagement with relevant associated persons and external bodies to help articulate the organisation's policies.

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 provides practical advice on how a risk assessment should be performed. Commonly encountered risks include transaction risk as certain types of transaction give rise to higher risks e.g. charitable or political contributions, licenses and permits and transactions relating to public procurement.

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.”*

Depending on the results of the risk assessment, appropriate due diligence steps can be anything from simply asking an agent for a CV, financial statements or accounts to more sophisticated techniques involving external advisers where the risks are higher. The government has indicated that it is desirable to have face to face meetings with third parties such as agents, in order to arrive at personal assessments about the risk of doing business with them, as well as requesting to see the agent’s own anti bribery policy or, where a corporate body, its reporting procedures and records.

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.”*

This would include communication to external associated persons. The Guidance advises that, like all procedures, training should be proportionate to risk but some training is likely to be effective in firmly establishing an anti-bribery culture whatever the level of risk. Training may take the form of education and awareness raising about the threats posed by bribery in general and in the sector or areas in which the organisation operates in particular, and the various ways it is being addressed.

6. Monitoring a Review:

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

**6. Issues for Public Authorities**

- 6.1 The most relevant offences for public authorities are Section 2 (receiving a bribe) and Section 7 (failure of the organisation to prevent a bribe).

The Act has implications for a public authority's corporate governance in respect of the codes of conduct for members and officers, its procurement practices and its anti-fraud and corruption policies (as particular transaction risks include procurement exercises and declarations of gifts and hospitality).

- 6.2. From an internal perspective there is arguably an increased risk of offences being committed if a public authority fails to implement adequate processes and procedures to prevent bribery. Equally implementing such processes will assist the authority from preventing bribery and corruption within any company in which it has an interest.
- 6.3 In terms of the implications of the Act on the Public Contracts Regulations 2006 under which a bidder may be automatically and perpetually debarred from competing for a public contract where it has been convicted of a corruption or bribery offence, the Secretary of State for Justice confirmed to Parliament (on 30 March 2011) that any organisation convicted under Section 7 of the Act for failing to prevent bribery, will not be automatically barred from participating in tenders for public contracts under regulation 23(1) of the Regulations. However, public authorities will still have the discretion to exclude organisations convicted of the Section 7 offence under Regulation 23(4) (discretionary grounds for exclusion). Kenneth Clark stated:

*“the government have also decided that a conviction of a commercial organisation under Section 7 of the Act in respect of a failure to prevent bribery will attract discretionary rather than mandatory exclusion from public procurement under the UK's implementation of the EU Procurement Directive (Directive 2004/18). The relevant regulations will be amended to reflect this.”*

## **7. Actions for Hampshire Fire and Rescue Authority**

- 7.1 The need for procedures to avoid bribery and corruption is not entirely new to public authorities. The Authority already operates an Anti-fraud and Corruption Strategy, while the Members' Code of Conduct contains a requirement that Members register the interests of any person from whom they have received a gift or hospitality with an estimated value of at least £25.
- 7.2 However, the introduction of the Bribery Act, and the creation of new offences with potentially serious penalties provides a suitable opportunity to review existing policy and procedure to ensure that this is sufficient to protect the interests of the Authority, its Members and officers. Work is currently in progress therefore to review relevant policy and procedures. It is recommended that the Committee endorse such action and request that a further report is brought to the Committee on any changes made.

## **8. Equality Impact Assessment**

8.1 These proposals are not considered to give rise to any issues in the context of the provisions of the human rights and equalities legislation

## 8. **Conclusion**

8.1 It is advisable for public authorities to review the implications of the offences detailed in the Act and to take the necessary action to ensure that relevant policies and procedures are revised to protect the Authority from any non compliance.

### Section 100 D –Local Government Act 1972 – background papers

The following documents disclose facts or matters on which this report, or an important part of it, is based and has been relied upon to a material extent in the preparation of this report:

None.

NB the list excludes:

Published works

Documents that disclose exempt or confidential information as defined in the Act.