

White Paper

The Bribery Act 2010

Knowing where to draw the line

Introduction

This White Paper addresses the practical implications of the Bribery Act for commercial organisations with a business presence in the UK. No such business is immune from prosecution under the Bribery Act.

The problem with the legislation is that it does not draw a perfectly straight line between illegal bribery and business-as-usual activity. For this reason, businesses must introduce or refine policies so that their staff and associated persons understand where this line is drawn.

Overview of the Bribery Act

You may have seen coverage of this new law in the press, but if the detail has passed you by then you are not alone. The media has focused its attention largely on the issue of corporate hospitality. However, bona fide business entertainment is unlikely to attract criminal prosecution.

In short, a bribe is the passing of a financial or other advantage (non-cash rewards can be bribes) with the intention that a person is thereby induced or rewarded to perform their job or responsibilities improperly. We tend to think of wads of cash in brown paper envelopes, but in reality bribes are more likely to be paid under cover of pension fund injections, donations to non-existent charities or lavish entertaining.

The Bribery Act covers both 'personal gain bribery' i.e. where the recipient of the bribe takes the advantage for him or herself and 'noble cause bribery' i.e. where bribes are paid so that the organisation benefits by winning or retaining business. Mistakenly, some business men or women do not consider noble cause bribery to be bribery at all - they are in for a shock.

The Bribery Act applies to the public and private sectors. No matter where in the world a bribe takes place, the act covers:

- British citizens and British overseas territories citizens
- UK companies and individuals resident in the UK
- Persons having a close connection to UK (i.e. if an organisation has a business presence in the UK, however insignificant)

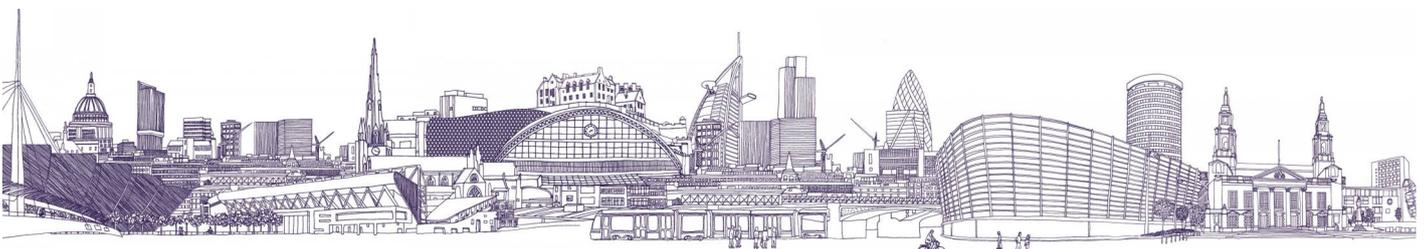
The Bribery Act came into force on 1 July 2011. As from this date, your business and your staff are liable to prosecution for new criminal offences introduced by this legislation.

In summary, these offences are:

- *Active bribery: offering or giving a bribe*

It is an offence to offer, promise or give a bribe (being a financial or other advantage).

- *Passive bribery: requesting or accepting a bribe*



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It is an offence to request, accept or agree to receive a bribe.

- *Bribing a foreign public official*

It is an offence to bribe a foreign public official.

- *Consenting or conniving in bribery*

A senior person in an organisation is guilty of an offence if he or she consents or connives in any bribery offence.

- *Failing to prevent bribery*

If a commercial organisation fails to implement adequate procedures where an act of bribery is committed in connection with its business, the organisation is guilty of a criminal offence.

If an organisation is charged with being associated with bribery which it has failed to prevent, there is only one defence. The organisation must prove that it is enforcing adequate procedures to prevent bribery.

The Ministry of Justice has issued guidance as to what amounts to adequate procedures and your policies and procedures will fall to be assessed against these guidelines. Organisations that do not implement adequate procedures only have themselves to blame. The guidance focuses on six principles:

- Proportionality
- Top level commitment
- Risk assessment
- Communication
- Due diligence
- Monitoring and review

Organisations which adopt procedures to prevent bribery may find that these do not pass the test of adequacy unless:

- The board of directors or equivalent takes an active role in overseeing the enforcement of the anti-bribery programme.
- The procedures can be cross-referenced to a comprehensive risk assessment which identifies corruption risks.
- The procedures are proportionate to the identified risks and the nature, scale and complexity of the organisation's activities.
- The anti-bribery procedures are properly communicated within the organisation and externally.
- Underpinning the procedures is an effective due diligence programme which scrutinises business partners and associates to establish whether they are bona fide.
- Constant stress-testing of the procedures to ensure that they remain effective and vigilance is maintained.

Even though you may not have experienced any previous problems concerning bribery or corruption, you now run the risk of committing a criminal offence if your business fails to take adequate steps to prevent bribery. All businesses should now take steps to review their policies and procedures with a view to ensuring compliance with the Bribery Act. Organisations that already have policies and procedures in place should review their current practices to ensure that they are Bribery Act compliant.

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Implications for failure to comply

Penalties and other consequences of being found guilty include:

- For individuals and directors – unlimited fine or 10 years imprisonment (also, directors may be disqualified under the Company Directors Disqualification Act).
- For organisations – unlimited fine and confiscation of the benefit obtained by the offender under proceeds of crime legislation (Proceeds of Crime Act).
- Contracts obtained by bribery may be void on grounds of public policy.
- Exclusion from tendering for public contracts in the EU.
- Directors owe fiduciary duties and failing to prevent bribery may give rise to claims from aggrieved shareholders if the value of shares in a company guilty of a bribery offence plummet (which has happened in the US).
- Bribes are not allowable expenses for tax purposes – if organisations make bribes, possibly not realising that the reward bestowed was a bribe and then claim allowance for the making of such payment, this may amount to a separate offence in itself.
- Major corporates will now require all companies they do business with to be Bribery Act compliant as a pre-requisite to making new business.
- Senior officers of an organisation with whose ‘consent or connivance’ bribery was committed are also liable to imprisonment and/or fines. Directors convicted of a bribery offence may be disqualified from acting as a company director for up to 15 years.

Because organisations can be held liable for their employees and those who provide services to them (e.g. agents, intermediaries and advisers) the adequate procedures must apply across all associated persons, but they will each be incentivised to comply because those guilty of bribery are susceptible to unlimited fines and up to 10 years imprisonment. Any senior manager who connives in bribery is personally liable.

Notwithstanding press speculation, reasonable hospitality to network and improve relationships with customers is unlikely to attract criminal prosecution. There has to be an attempt to induce a person to behave improperly or to reward that person for improper behaviour, although where an attempt is made to bribe trustees, company directors and those known to be subject to duties not to accept inducements this limb of the offence is automatically made out.

The Bribery Act is, to a large extent, self-policing. Your adequate procedures will draw the line between right and wrong within the organisation.

The 10 steps that all organisations should take right now:

1. Seize the opportunity to demonstrate Bribery Act integrity. Senior management should be visibly and actively involved.
2. Carry out a risk assessment to identify vulnerable areas, based on which policies can be developed to counter specific risks.
3. Make a statement (from the board) committing to Bribery Act compliance addressed to both staff and associated persons as well as to suppliers and customers.
4. Write/review a Bribery Act compliance programme for itself and all associated persons (setting out the zero-tolerance approach to bribery and corruption as well as establish specific rules regarding gifts, hospitality and promotional expenses policies, charitable donations, political contributions, facilitation payments etc.). Keep written records to evidence the programme as it is implemented.
5. Communicate the programme and educate staff and associated persons as to the impact of the Bribery Act. Appoint a compliance officer tasked with implementation of the programme.

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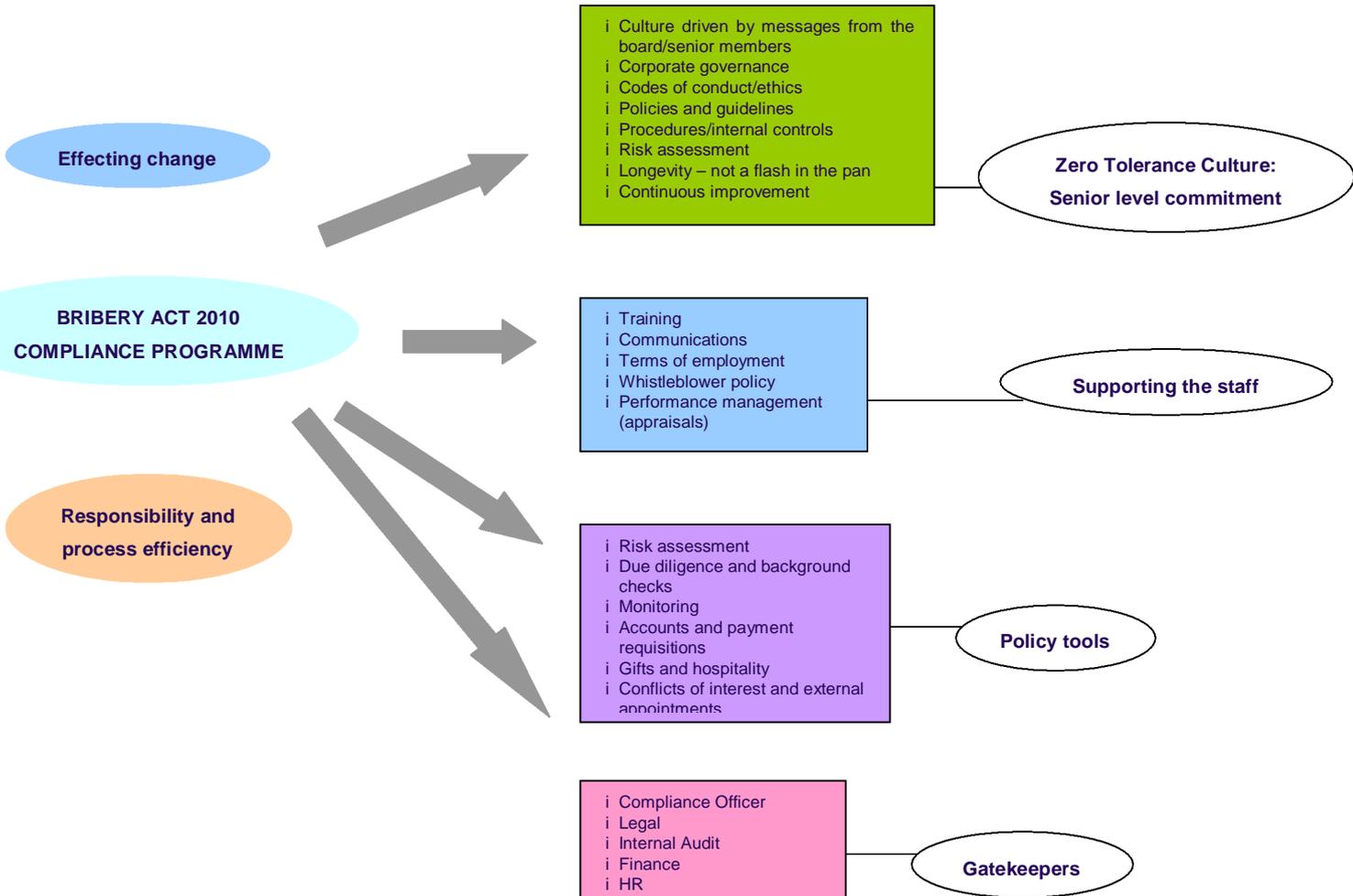
6. Review all HR and disciplinary procedures, processes, policies and contracts to ensure compliance e.g. whistle blowing policy.
7. Review internal procedures and controls e.g. accounting systems to root out bribery risks.
8. Review existing contracts and standard form contract templates to ensure that Bribery Act compliance is covered e.g. rights to terminate if the counterparty is guilty of bribery or fails to adhere to reciprocal anti-bribery policies and procedures.
9. Undertake due diligence on all agents/joint venture partners/intermediaries – know who you are dealing with and how they approach bribery and corruption.
10. Determine whether the Bribery Act compliance programme being implemented by your trading partners will impact upon your business e.g. will compliance with the Bribery Act be a pre-condition of doing business.

Help is at hand

Our soundings reveal that some businesses intend to rely on existing (i.e. out-dated) codes of conduct. Several US owned companies think (inaccurately) that their FCPA based policies are adequate in the UK. Others have raided the internet to copy and paste their way to Bribery Act compliance. A few are trusting to luck and doing nothing. If you are one of these businesses you may be in for an unpleasant shock.

That said, there is really no need to over-react. If undertaken wisely, establishing an anti-bribery programme should not require a vast budget; most businesses should be gearing up to implement an efficient and relatively inexpensive programme of adequate procedures. The consequences of being convicted are just too momentous to do otherwise.

Gateley has developed the **Bribery Act compliance tool kit** which is available online. We can use this to assist you to devise and implement your anti-bribery programme.



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The Bribery Act compliance tool kit we have developed includes:

- Guidance
- Risk assessments
- Checklists to ascertain how compliant your organisation is now
- Policies and protocols
- Briefing for the board
- Briefing to staff and associated persons
- Compliance officer's job description and responsibilities
- Training materials
- Plug-in contractual clauses
- Due diligence on trading partners, acquisition targets and joint venture partners
- Procurement checklists
- Crisis management policy
- Monitoring audit
- Other tools that will assist your business to keep on the right side of the Bribery Act

In all probability, prosecutions under the Bribery Act may be few and far between, but the consequences will be serious and will attract high profile media attention. So much so, that many major businesses will be imposing checks and controls with their trading partners so ensure that their entire supply chain is free from the taint of bribery and corruption. Although the risk of committing an offence is low, in order to do business with your customers and suppliers you may be called upon to demonstrate Bribery Act compliance.

You can take our Bribery Act compliance health check by visiting <http://www.gateleyplc.com/news-and-events/publications/item/the-bribery-act-2010-compliance-healthcheck/>

Further details concerning our Bribery Act compliance tool kit are available. Please contact:

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