

Training obligations under the Bribery Act 2010

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Failure to prevent bribery

The provisions of the Bribery Act 2010 ("the Act") make it a criminal offence for a commercial organisation to fail to prevent bribery. Section 7 of the Act provides that a relevant 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. Under section 8 of the Act, a person is associated with a commercial organisation if they perform services on its behalf. Its employees, agents and subsidiaries are all therefore treated as being associated with a commercial organisation.

Is a local authority a relevant commercial organisation?

It is not immediately obvious that local authorities are caught by the provisions of the Bribery Act but, as ever, the devil is in the detail. The term "relevant commercial organisation" is defined at section 7.5 of the Act and includes a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere). Government guidance issued by the Ministry of Justice (and available at <https://www.gov.uk/government/publications/bribery-act-2010-guidance>) states that:

*"The courts will be the final arbiter as to whether an organisation 'carries on a business' in the UK taking into account the particular facts in individual cases. However, the following paragraphs set out the Government's intention as regards the application of the phrase. ... As regards bodies incorporated in the UK, despite the fact that there are many ways in which a body corporate can pursue business objectives, the Government expects that whether such a body 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), **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.**"*

Note that, in the Government's view, a charity that is incorporated will also be caught by the provisions of the Act.

Defences

It is a defence to a charge of failing to prevent bribery for a commercial organisation to prove that it had in place adequate procedures designed to prevent bribery by persons associated with it. The Government guidance sets out six principles which should inform procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf.

Principle 1: A commercial organisation's procedures to prevent bribery by persons associated with it should be proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They should also be clear, practical, accessible, effectively implemented and enforced.

Principle 2: The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) must be committed to preventing bribery by persons associated with it. They should foster a culture within the organisation in which bribery is never acceptable.

Principle 3: The commercial organisation should assess 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 should be periodic, informed and documented.

Principle 4: The commercial organisation should apply 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: The commercial organisation should seek 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. With regard to training, the government guidance states:

- 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;
- General training could be mandatory for new employees and for agents (on a weighted risk basis) as part of an induction process, but it should also be tailored to the specific risks associated with specific posts. Consideration should also be given to tailoring training to the special needs of those involved in any 'speak up' procedures, and higher risk functions such as purchasing, contracting, distribution and marketing, and working in high risk countries. Effective training is continuous, and regularly monitored and evaluated.
- It may be appropriate to require associated persons to undergo training. This will be particularly relevant for high risk associated persons. In any event, organisations may wish to encourage associated persons to adopt bribery prevention training.
- Nowadays there are many different training formats available in addition to the traditional classroom or seminar formats, such as e-learning and other web-based tools, but whatever the format, the training ought to achieve its objective of ensuring that those participating in it develop a firm understanding of what the relevant policies and procedures mean in practice for them.

Principle 6: The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

The Government's view is clearly that a local authority or incorporated charity which engages in commercial activities with a view to making profits is caught by the Act. As the guidance itself says, the government's view is not decisive: the courts will be the final arbiter, but it would be a high risk strategy for a public sector body or incorporated charity to take an opposite view and ignore the guidance. Risk assessment, due diligence and training should all therefore be in place.

If you have any queries relating to this guide or wish to seek legal advice, please contact:

Or: If you have any queries relating to this guide or wish to seek legal advice, please contact:

David Johnson at david.johnson@norfolk.gov.uk or on 01603 223247



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