

ITEM NO: 10

REPORT TO:	STANDARDS COMMITTEE
DATE:	31 August 2010
REPORT OF:	Sandra Stewart - Borough Solicitor (Monitoring Officer)
SUBJECT MATTER:	THE BRIBERY ACT 2010
REPORT SUMMARY:	The Bribery Act 2010, which overhauls the country's outdated anti-corruption laws, is set to come into force in April 2011. This report sets out the current position and recommends that the necessary steps is taken by the Authority to ensure that it is ready for implementation.
RECOMMENDATION(S)	Note the implications of the implementation of the Act and request that a further report be received from the Council's Head of Audit/ Counter Fraud Specialist as to the council's strategy to implement the act including communicating with employees and partners/contractors.
FINANCIAL IMPLICATIONS: (Authorised by Borough Treasurer)	There are no significant financial issues arising from this Report.
LEGAL IMPLICATIONS: (Authorised by Borough Solicitor)	Set out in the Report.
RISK MANAGEMENT:	Standards Committees should be aware of the National position in order that consistency of approach is taken in respect of setting and advising on local ethical and standard issues.
LINKS TO COMMUNITY PLAN:	Support the current arrangements for ethical and corporate governance of the Authority to ensure that the public can have confidence in local government.

ACCESS TO INFORMATION

NON-CONFIDENTIAL

This report does not contain information which warrants its consideration in the absence of the Press or members of the public

REFERENCE DOCUMENTS:

The background papers relating to this report can be inspected by contacting the report writer, Sandra Stewart, the Council's Borough Solicitor and statutory Monitoring Officer by:

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INTRODUCTION

1. The Bribery Act 2010, which overhauls the country's outdated anti-corruption laws, is set to come into force in April 2011. Ahead of this, a short consultation process in relation to the wide reaching new offence of "*failing to prevent bribery*" is due to commence this September. The consultation is backed by a government promise to publish its findings and guidance on how commercial organisations can reduce the risk of prosecution for an offence under section 7, early in the New Year.
2. Everyone knows what a bribe is and the outlawing of bribery and corruption has been a focus of Parliament since the Magna Carta declared that "*We will sell to no man ...either justice or right*".
3. To actually define bribery and corruption as a matter of law, however, has proved to be more complex. The latest attempt to address the problem has just hit the statute books; when the Bribery Act 2010 received Royal Assent on 8 April, the culmination of over a decade's work on reforming Britain's existing anti-corruption laws.
4. There was perceived to be a clear need for a legislative shake up as far back as 1989, when the UK signed up to the Organization for Economic Co-operation and Development (OECD)'s anti-corruption convention. Indeed the Law Commission released a new draft Bribery Bill as far back as 1998, although progress was slow as there was no consensus as to the best legislative approach to take.
5. On average, only 21 people per year (and no corporate bodies) were prosecuted for public sector corruption between 1993 and 2003. By comparison, there were an average of around 23,000 prosecutions per year between 1997 and 2001 for private sector fraud. This discrepancy was due not least to the fact that the existing anti-corruption legislation dated back to the early 1900's and was vague and outdated.
6. The project to reform the law took on a new urgency in the light of several recent high-profile corruption cases, the most infamous being BAE Systems and the "Al Yamamah" fighter jet deal (in which the Attorney-General (a political appointment) called off the investigation into corruption, allegedly at the insistence of prime minister Tony Blair). These cases have resulted in Britain's plunging to an embarrassing 17th place in Transparency International's 2009 "Corruption Index".

WHAT IS THE NEW LAW?

7. The Bribery Act applies in England and Wales and simplifies the existing law on bribery, enabling the courts to deal with it more effectively.
8. The Act creates offences of, amongst others, bribing another person/company/public body or accepting a bribe in return for giving an advantage to the briber. It also creates a "strict liability" offence for companies (but not public bodies) who negligently fail to prevent bribery within the business. The Act also introduces a new offence of bribery of foreign officials, which will be particularly relevant to multinational companies who operate in areas of the world where corruption and "facilitation payments" are commonly found. It also removes the requirement for Attorney-General consent to prosecution; proceedings may now only be brought at the instigation of the Director of a relevant prosecuting authority.
9. Of particular interest to local authorities, however, is the offence under section 2 in which a person "requests, agrees to receive or accepts" an advantage of some kind in return for improperly performing, or allowing the improper performance of, a "function or activity" where that function/activity is either of a public nature or done in the course of a business.

10. 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 an “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.
11. 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.
12. Penalties under the Act include fines and/or imprisonment for up to ten years (for the more serious offences).

WHAT ARE THE IMPLICATIONS FOR CONTRACTING AUTHORITIES?

13. Contracting authorities could therefore be guilty of bribery if, for example, they agree to “fix” a procurement evaluation process in the briber’s favour in return for some advantage. It seems it would also be possible for a local authority to be guilty of bribing a supplier if it offers some sort of advantage to a supplier in return for the supplier agreeing to improperly perform an activity connected with the running of its business (e.g. bribing the supplier to submit a lower-priced bid than it would otherwise have done).
14. The Office of Government Commerce will no doubt be publishing updated boilerplate standard clauses on the prevention of corruption, which take into account the Act’s provisions and which we will need to ensure are included in public contracts. It will also be necessary to address in public contracts the consequences of a supplier being found guilty of a Bribery Act offence. For example, the prosecution of a major supplier for negligent failure to prevent bribery is likely to be embarrassing for a local authority, which may wish to have the option of immediately terminating the contract in these circumstances.
15. Replacing much, and codifying the remainder, of the UK’s existing somewhat disparate anti-corruption laws which date as far back as 1889 and include the Prevention of Corruption Act’s of 1906 & 1916, the Bribery Act 2010 heralds a new era in the UK’s fight against corruption. It establishes among its key provisions distinct general criminal offences for those “offering” and those “accepting” bribes, a discreet offence for those who bribe foreign public officials and the infamous new section 7 offence of the failure of commercial organisations to prevent bribery by persons acting on their behalf, which is courting much concern and debate.
16. The new legislation has also been given the teeth to demonstrate and support the UK’s worldwide commitment to ethical business conduct providing for unlimited financial penalties and up to 10 year custodial terms, double the five year provision under the USA’s Foreign & Corrupt Practices Act deemed to date to be the current legislative benchmark, for breaches where circumstances on indictment dictate.
17. The announcement from the Ministry of Justice on the 20 July 2010 suggesting that three months will afford those affected with an “*adequate familiarisation period*” ahead of the legislation does not take into consideration the necessary time, commitment and resources that will be required by government departments to:
 - ✓ Conduct a full review and/or audit of their current systems and processes to combat bribery and corruption and prepare an action plan or strategy for improvement and change;
 - ✓ Draft and implement new, or where measures already exist update, procedures to deal with the requirements of the Act;

- ✓ Communicate, from Senior Management and Board to all central and support staff, an understanding and adoption of new, or changes to existing, policies and provide training on the changes.
18. Policies and process on paper alone will also be insufficient in their own right unless they are accepted and adopted at all levels within public sector departments, and compliance is recognised as a prerequisite for anyone wishing to work with the public sector. This may necessitate changes in culture and business planning which again requires time to determine, implement and embed.
 19. Returning specifically to the defence of having “*adequate procedures in place designed to prevent*” bribery for a breach under section 7 of the Act, many respected commentators have reached broad agreement that in order to qualify for the defence organisations must demonstrate those procedures working in practice, which again draws on resources and time. Policies and training will need to be documented, records of auditing and compliance measures will be required, gift and external interests registers must be kept and a zero tolerance to bribery and corruption policy publicised both internally and externally to identify but a few of the recommended steps.
 20. The requirement for both private and public sector compliance with the general and discreet offences of “giving” or “receiving” a bribe is beyond discussion. But in addition to the ongoing uncertainty as to what amounts to a defence of “adequate procedure”, there is also uncertainty as to whether local government departments fall strictly within the definition of a “relevant commercial organisation” in section 7. There is nothing elsewhere to suggest there has been a positive intention to exclude the public sector from potential sanction as a consequence of an employee’s, agent’s or subsidiaries’ acts of bribery intending to obtain/retain business or an advantage in their conduct of business.
 21. Sound practice and a degree of common sense dictates that rather than run the risk of an infringement, additional processes required to demonstrate that an active bribery prevention policy is in place are worthy investments for the future.
 22. The consequences of bribery reach further than an individual perpetrator’s profit since it impairs the benefits of competition, often increases costs, distorts and under optimises a decision-making process and destroys trust and confidence.
 23. In the absence of clear guidance from the secretary of state, it will be necessary to review such guidance as can be obtained from the **Fraud Advisory Panel**, the **Serious Fraud Office** and **internal correspondence within the House of Lords**
 24. As any incident of bribery or corruption will undermine public and business confidence and trust across all sectors, the public sector cannot really afford to sit back and fail to take steps to fight corruption akin to their private sector colleagues.