

TITLE OF REPORT: ANTI-BRIBERY POLICY

REPORT OF THE CORPORATE LEGAL MANAGER AND MONITORING OFFICER

1. SUMMARY

- 1.1 A report to consider a proposed Anti-Bribery Policy in light of the Bribery Act 2010.

2. FORWARD PLAN

- 2.1 This report does not contain a recommendation on a key decision and has not been referred to in the Forward Plan.

3. BACKGROUND

- 3.1 The Bribery Act 2010 (“the Act”) is due to come into force on 1 July 2011 following some delay and controversy surrounding its implementation. The Act is designed to address bribery and corruption in the public and private sector, and will mean that any incorporated organisation, potentially including councils, could be liable to severe penalties if they fail to implement adequate procedures to prevent bribes being paid or received on their behalf.
- 3.2 The Act includes two general offences involving, firstly, the offering or paying of bribes (“active” bribery) and secondly, the request or receipt of bribes (“passive” bribery). The Act also provides that a commercial organisation could be guilty of an offence if a person “associated with” the organisation commits a bribery offence. The definition of commercial organisation includes public bodies. However, organisations will have a defence against prosecution if they can demonstrate that they had “adequate procedures” in place to prevent bribery.
- 3.3 Currently, the law in this area provides that organisations are only likely to be guilty of a bribery offence if senior management is involved. However, under the new Act, the offence applies to all staff in the organisation and could even mean that an organisation may be guilty of an offence even if no-one within the organisation apart from the individual offender knew of the bribery.
- 3.4 Furthermore, organisations could be liable for the conduct of any person who “performs services” for or on behalf of the organisation, and this could include contractors and sub-contractors. There are serious penalties for offences committed under the Act, including a maximum jail term of 10 years for individuals engaging in bribery and potentially unlimited fines for organisations which fail to implement “adequate procedures” to prevent bribery.

- 3.5 The new Act will affect private and public organisations in the UK and it will be essential that the Council take proportionate steps to minimise the risks arising from the new legislation, so that it can demonstrate that adequate procedures are in place.
- 3.6 The Act was originally due to be implemented on 1 April 2011 but was delayed to allow the Government time to publish Guidance on the Act. This Guidance was not published until 30 March 2011. The proposed draft Policy is attached at Appendix A. Attached at Appendix B is the shorter Quick Start version of the Guidance, the full version is available as a background paper.

4. ISSUES

Offences

- 4.1 As stated the Act comes in to force on 1 July 2011 and may have an impact on the activities of the Council. There are four key offences under the Act:
- bribery of another person (section 1)
 - accepting a bribe (section 2)
 - bribing a foreign official (section 6)
 - failing to prevent bribery (section 7)

The offences carry criminal penalties for individuals and organisations. For individuals, a maximum prison sentence of ten years and/or an unlimited fine can be imposed; for organisations, an unlimited fine can be imposed.

Defence of “Adequate Procedures”

- 4.2 Councils will be expected to demonstrate they have implemented “adequate procedures” in order to prevent bribery. Having adequate procedures in place provides a defence to the corporate offence of failing to prevent bribery. The Ministry of Justice Guidance includes steps that can be taken by organisations to show that they have “adequate procedures” in place. The Guidance is based around six principles for bribery prevention, which are not prescriptive and are not intended to be “one size-fits-all”.
- 4.3 The six principles, as summarised in the Quick Start Guide, are:
1. Proportionate Procedures – “The action you take should be proportionate to the risks you face and the size of your business”.
 2. Top-level commitment – “Those at the top of an organisation are in the best position to ensure their organisation conducts business without bribery”.
 3. Risk Assessment – “Think about the bribery risks you might face. For example, do some research into the markets you operate in and the people you do business with...”.
 4. Due diligence – “Knowing exactly who you are dealing with can help to protect your organisation from taking on people who might be less than trustworthy”.
 5. Communication (including training) – “Communicating your policies and procedures to staff and to others who will perform services for you...”.
 6. Monitoring and review – “The risks you face and the effectiveness of your procedures may change over time”.

- 4.4 In light of the six principles, it is essential that the Council's policies are up to date, reflect the requirements of this new legislation and are sufficiently robust to prevent bribery and to mitigate the risk of committing a bribery offence.

Guidance on Approach to Take

- 4.5 The Guidance makes clear that if there is very little risk of bribery being committed on behalf of an organisation then there may not be the need for any procedures to prevent bribery. However where there is a risk of bribery then, if an organisation wants to rely on the defence, the procedures adopted should be proportionate to the risk faced. There are no requirements for extensive written documentation or policies, particularly as it is acknowledged that an organisation may already have proportionate procedures through existing policies.
- 4.6 The Council currently has in place an Anti-Fraud and Corruption Policy which is the overall framework for good ethical governance at the Council. Under this Policy fall the Confidential Reporting (Whistleblowing) Policy, Conflicts of Interest Policy and Anti-Money Laundering Policy. Additionally there is a Gifts and Hospitality Policy. All are potentially affected by the new Bribery Act requirements, but provide a good starting point for a proportionate approach to these new requirements.

Approach Adopted in Draft Policy

- 4.7 Taking into account the considerations set out in paragraphs 4.2 to 4.5 above it is proposed that a new Anti-Bribery Policy be introduced and incorporated within the existing governance framework. The proposed policy is intended to allow "business as usual" whilst making officers and members aware of the additional new offences created by the Bribery Act.
- 4.8 The proposed policy attached at Appendix A is based upon a CIPFA template and is intended to build upon (and refer to) the policies already in place whilst also spelling out some of the requirements of the Bribery Act not currently covered explicitly by existing policies. It is intended that this Anti-Bribery Policy fit within the overall Anti-Fraud and Corruption framework and therefore the Anti-Fraud and Corruption Policy should be updated with a slight amendment to refer to the new policy.

Effect on Procurement of a section 7 offence

- 4.9 Under the Public Contracts Regulations 2006, a company is automatically and perpetually debarred from competing for public contracts where it is convicted of a corruption offence. The Government has stated that there are no plans to amend the 2006 Regulations for this to include the corporate offence of failure to prevent bribery (section 7). Organisations that are convicted of failing to prevent bribery are therefore not automatically barred from participating in tenders for public contracts. However the Council has the discretion to exclude organisations convicted of this offence.
- 4.10 It is intended that the Council's template Pre-Qualification Questionnaire and Invitation to Tender are amended to include a specific question on whether a bidder has been found guilty of a section 7 Bribery Act offence, with the Council reserving the discretion to exclude any bidder convicted of such an offence. It is considered that implementation of a "blanket ban" policy on any bidders convicted of a section 7 offence may be difficult to defend if challenged by judicial review as the Council would

likely have fettered its discretion and therefore a “blanket ban” approach is not suggested. This will be raised as a matter for the Council’s Contract and Procurement Group.

- 4.11 Standard contract templates will also be amended to incorporate a suitable provision relating to the Bribery Act.

Promoting with Officers and Members

- 4.12 There is a need for all Officers and Members to be aware of the Policy and the reasons for it. In the event that the Policy is supported and approved by Cabinet, it will be loaded onto the intranet in the usual way and a message will go out in teamtalk initially. Reference to the Policy will be made as part of the Code of Conduct training for Members and a roll out via the Learning Management System so that Officers are required to confirm acceptance of the Policy.

5. LEGAL IMPLICATIONS

- 5.1 The Terms of Reference for Finance Audit and Risk Committee confirm that the Committee is responsible for monitoring the effective development and operation of risk management and corporate governance in the council and to consider the council’s arrangements for corporate governance and agreeing necessary actions to ensure compliance with best practice.
- 5.2 The Policy will be put before Cabinet on 14 June 2011.
- 5.3 The Bribery Act 2010 creates four new offences, bribery of another person (section 1), accepting a bribe (section 2), bribing a foreign official (section 6) and the corporate offence of failing to prevent bribery (section 7). An organisation has a defence to the corporate offence if it can show that it had in place adequate procedures designed to prevent bribery by or of persons associated with the organisation
- 5.4 An individual guilty of an offence under sections 1, 2 or 6 is liable:
- On conviction in a magistrates court, to imprisonment for a maximum term of 12 months, or to a fine not exceeding £5,000, or to both
 - On conviction in a crown court, to imprisonment for a maximum term of ten years, or to an unlimited fine, or both

Organisations are liable for these fines and if guilty of an offence under section 7 are liable to an unlimited fine.

- 5.5 Within the Guidance there are parts where the Government appears to seek to re-interpret the Act to sound less onerous, offering views on corporate hospitality, facilitation payments and when a foreign corporate will be caught by the Act. It is unclear what weight the courts will give to this Guidance, given the Act only requires the Government to publish guidance on procedures and not interpretation. These views also indicate a possible tension between the Government and the Serious Fraud Office as to how the Act should be interpreted and enforced.

6. FINANCIAL AND RISK IMPLICATIONS

- 6.1 This Policy ties in with existing Policies and Procedures and therefore requires no further resource to implement.
- 6.2 The Council has numerous controls already in place such as the Anti-fraud and corruption policy and Contract Procurement Rules that protect the Council against losses of this nature. There have been no known instances of fraud and corruption by employees in the last 10 years. The Council does have a Fraud & Corruption risk that will be reviewed in the next month to ensure that the risks arising from bribery & corruption are included. This will then ensure we comply with the draft policy statement that we have a documented risk assessment. This will be taken to the next meeting of the Corporate Governance Group for approval.

7. HUMAN RESOURCE AND EQUALITIES IMPLICATIONS

- 7.1 The Human Resources team will support the application of this policy with advice to staff where required and there will be planned communications and steps taken to make all staff aware of the policy as set out in 4.10.
- 7.2 The contents of this report do not directly impact on equality, in that it is not making proposals that will have a direct impact on equality of access or outcomes for diverse groups.

8. CONSULTATION WITH EXTERNAL ORGANISATIONS AND WARD MEMBERS

- 8.1 The Policy has been considered by CMT.

9. RECOMMENDATIONS

- 9.1 That Finance Audit and Risk Committee consider and support the draft Anti-Bribery Policy.
- 9.2 That the Anti-Fraud and Corruption Policy be amended to include a reference to the Anti-Bribery Policy.

10. REASONS FOR RECOMMENDATIONS

- 10.1 To ensure that prior to the coming into force of the Bribery Act 2010 on 1 July 2011 the Council has adequate procedures in place designed to prevent bribery by or of persons associated with the Council.

11. ALTERNATIVE OPTIONS CONSIDERED

- 11.1 An alternative approach was considered of amending existing policies, in particular the Anti-Fraud and Corruption Policy, to make reference to the provisions of the Bribery Act. This approach was discounted because it is considered easier and clearer to just

implement one new policy rather than existing policies that may overlap. This also allows easier notification of the new policy to officers and members. Additionally having a specific anti-bribery policy will assist with any future amendments needed as a result of further legislation, guidance or case law which may be forthcoming following the Act coming into force.

12. APPENDICES

- 12.1 Appendix A – Draft Anti-Bribery Policy.
- 12.2 Appendix B – The Bribery Act 2010 Quick Start Guide, Ministry of Justice

13. CONTACT OFFICERS

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14. BACKGROUND PAPERS

- 14.1 The Bribery Act 2010
- 14.2 The Bribery Act 2010 Guidance, Ministry of Justice