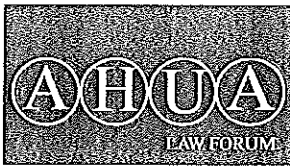


**THE BRIBERY ACT 2010 –  
IMPLICATIONS FOR UNIVERSITIES**

**Stewart Brymer  
Brymer Legal**



## THE BRIBERY ACT 2010 – IMPLICATIONS FOR UNIVERSITIES

### INTRODUCTION

The Bribery Act 2010 ("the Act") is due to come into force on July 1 2011<sup>1</sup>. Once in force, the Act will introduce offences for acts of bribery by individuals, or by persons associated with relevant commercial organisations. In relation to organisations, there is a defence if the organisation can show that it has in place adequate procedures for preventing bribery.

Organisations affected by the Act should have in place comprehensive and effective anti-bribery policies and procedures, ideally in advance of April 2011. Such policies will not remove, but will significantly mitigate, risk.

### ARE UNIVERSITIES "COMMERCIAL ORGANISATIONS" FOR THE PURPOSES OF THE ACT?

In the Act, the definition of "relevant commercial organisation" includes incorporated bodies and other bodies corporate, carrying on a business in part of the UK. Universities, pre- and post-1992, are bodies corporate, with charitable status, either incorporated by Charter or pursuant to the Further and Higher Education Act 1992.

"Carrying on a business" is not further defined in the Act. However, the only safe interpretation is to assume that universities are carrying on a business, even if they are not doing so as a "for profit" entity: it is not likely that the charitable status of universities in any way diminishes their status as commercial organisations.

A body corporate cannot itself commit an offence; the corporate offence will be one committed by a "person associated" with the body. "[P]erson associated" could have a very broad interpretation. It will certainly include employees and office bearers of a University, and agents on behalf of a University. It is also likely to include more "remote" persons, such as contractors appointed by the University, and joint-venture partners, for example in spin-out companies.

### OFFENCES UNDER THE ACT

The Act creates four offences. The first three are offences that can only be committed by individuals:

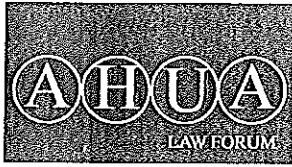
1. Promising or offering a bribe;
2. Requesting, agreeing to receive or accepting a bribe;
3. Bribing a foreign public official; and
4. A corporate offence of "failure to prevent bribery" by "persons associated" with a commercial organisation.

Failure to prevent bribery is a strict liability offence, so there is no need to demonstrate intention on the part of the organisation in order for the crime to have been perpetrated.

Note, though, that the commercial offence is committed only by the act of bribery **by** an associated person. The organisation cannot itself be guilty of an offence where a bribe is **accepted** by an associated person. Nonetheless, Universities need to have policies in place to ensure that none of their staff or other associated persons will accept bribes. Although any offence will be committed by the individual, the reputation of the University is at stake.

---

<sup>1</sup> The text of the Bribery Act 2010 can be found at <http://www.legislation.gov.uk/ukpga/2010/23/contents>



If it can be proved that the act of bribery was committed with the consent or connivance of a senior officer of the body corporate, or a person purporting to act in such a capacity, that person will be guilty of an offence as an individual, as well as there being repercussions for the body. The definition of "senior officer" would seem to include all senior office bearers of a University.

## THE PENALTIES

The maximum sentence for an individual is 10 years. Organisations are liable for an unlimited fine. It is expected that fines will be determined by reference to an organisation's annual turnover, which is the common method when punishing anti-competitive conduct by organisations. As Universities do not have a turnover as such, there is no way of being clear at this point what the fine might be, but in any event, even if it is proportionate to the offence, it is not likely to be a small sum.

## DEFENCES

For commercial organisations, the only available defence is to prove that the organisation had in place "adequate procedures" designed to prevent persons associated with the organisation from committing an act of bribery. The final version of guidance was published by the Ministry of Justice on 31 March 2011<sup>2</sup>, suggesting what might be adequate procedures, but it will be for each organisation to consider its own measures, with reference to that guidance as necessary. However, written policies alone are not likely to be sufficient; the provision of training and taking measures to ensure that other associated persons are made aware of policies, will both be important aspects of adequacy.

## TERRITORIAL EXTENT

The Act has extra-territorial reach, so the offence does not need to take place in the UK. This is a pertinent aspect for Universities, for example in relation to their activities to attract overseas students.

## IMPLICATIONS FOR UNIVERSITIES

Individuals within Universities could be involved in an activity which could constitute the offence of making a bribe. A University would be at risk of committing the strict liability offence if it could not prove that it had adequate procedures in place to prevent bribery.

Also, it is possible that a member of staff, agent or other person associated with the University could commit the offence of **accepting** a bribe. This offence would result in no criminal sanction for the University. The primary implication for the University is risk to its reputation by association with the individual. There is also the secondary issue of whether and what disciplinary or other action should be taken against that person, and how any action should be taken.

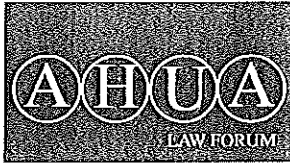
Universities have relatively direct control over their staff and agents, and can therefore relatively easily make them aware of policies and procedures, and provide relevant training. Less easy, perhaps, will be dealing with more remote individuals or organisations who may be associated persons.

For example, if a University is procuring a new campus building, the contractor may be considered an associated person for the Act, and the University will have to consider what steps it must take with the

<sup>2</sup> Ministry of Justice Guidance on Adequate Procedures

<http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>

See also Transparency International UK's Guidance on good practice procedures for corporate anti-bribery programmes at <http://www.transparency.org.uk/publications/114-adequate-procedures>



contractor (a) to ensure that the contractor is aware of the University's position on bribery, and (b) to ensure that the contractor itself has adequate procedures in place to prevent offences under the Act.

The threat of bribery offences being committed is greater for universities which conduct international activities, and private sector ventures, such as joint ventures and spin-out companies for commercialisation of research. Each of these activities extends the number of associated persons, as well as increasing the likelihood of universities being considered "commercial organisations".

### **WHAT SHOULD UNIVERSITIES DO?**

There is no way to completely remove the risk, but there are a number of measures which can be taken to significantly mitigate the risk.

Universities should consider appointing a compliance officer. This should probably be a fairly senior-level appointment, and someone who is in a position to implement the necessary measures at all required levels within the organisation. The Finance Director or HR Director are perhaps obvious candidates.

The following is a non-exhaustive list of practical steps which universities can take to mitigate their risk in relation to bribery.

#### **Policies and training**

Universities should:

- identify areas of risk, for example, donations, and activities in countries perceived as having a high risk of corruption in business activities;
- have a clear definition of what is a bribe, and what it is to make or receive a bribe;
- have a clear policy prohibiting employees from soliciting, arranging or accepting bribes;
- have a clear policy on the giving or acceptance of gifts, hospitality and expenses, especially where this could affect, or could be perceived to affect, the outcome of business transactions;
- have a clear policy informing all personnel of the sanctions and disciplinary action for individuals found guilty of an offence under the Act; and
- ensure that the policies are distributed to all those who need to be aware of them, and provide top-down training for all staff to embed all of the above.

#### **External relationships**

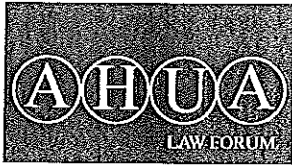
Universities should:

- undertake thorough due diligence in relation to participants in business relationships and projects before entering into them; and
- ensure that contractors, agents and business partners are aware of, and agree to adhere to, the University's anti-bribery policies and procedures, and where necessary have adequate procedures of their own in place.

#### **Control and audit**

In so far as not already in place, Universities should consider implementing:

- regular checks and audits;
- a system for maintaining accurate records of all financial transactions;
- effective reporting and investigation mechanisms;
- a procedure for the reporting by staff of suspicious activities; and



- regular risk assessments to identify weak areas or to update policies and procedures for new activities or associates.

## CASE STUDIES

A couple of examples may help to put the issue into perspective:

- (1) **A University receives a donation from an overseas organisation shortly before it receives an application from an overseas student associated with that organisation.**

First, it is worthy of note that, because this is a money being **accepted** by the University or one of its staff or associates, there is no offence which can be committed by the University *qua* commercial organisation under the Act.

If the donation is offered to an individual and not to the University generally, at worst, the offence might be that of an associated person who, in receipt of the donation, commits one of the personal offences. For example, an admissions officer improperly exercises his or her function in order to secure a place for the applicant, who, but for the donation, would not have secured that place.

To avoid any possible problem in this regard, the bribery policy should make it clear that staff, agents and other associated persons shall not accept donations or gifts of any size or nature without clearance from a named authority within the University. This should be fenced with appropriate consequences for those who transgress; for example, stipulation that it might constitute gross misconduct permitting termination of employment.

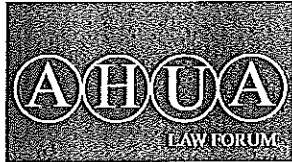
It is more likely that a donation or gift will be made to the University generally, as opposed to an individual associated with it. Even though no corporate offence can be committed, those who deal with such donations and gifts should be obliged by policy not to accept a donation or gift on behalf of the University without clearance from a named authority. Steps should then be taken to establish whether or not the donation or gift can be connected to any ulterior motive beyond simple philanthropy. For example, all reasonable steps should be taken to establish whether or not the donation or gift can be associated with a current student or an applicant for admission. This is just a wise precaution to protect reputation.

Of course, a donation may be made some time in advance of a prospective student making an application. Again, by accepting a donation in the circumstances described the University *qua* commercial organisation cannot be implicated in an offence. Therefore, it will be for each University to decide to what extent they want to investigate the possibility of a link between a prospective student and the making of an earlier donation or gift.

- (2) **A University has agents in a number of Middle Eastern countries, acting as brokers for overseas students. The agent is known to act for more than one University. For each student introduced by the agent, the agent is paid a fixed fee.**

Provided that the Agency Agreement is formally and properly documented, and the University keeps a full audit trail of agency fees paid, there are not likely to be any bribery issues with this arrangement. The agent is an associate of the University, and so it will be important for Universities to ensure that their agents are made aware of their bribery policy. Agents should be clear that it is not acceptable for them to receive an inducement which might affect their proper conduct.

One grey area which might arise is where an agency fee being paid by one University is disproportionately high by comparison to that of another University being paid to the same agent. Could it be implied that the higher fee is a bribe; an inducement to the agent to work harder to promote one University over another? If the higher fee was judged to be intended to obtain an advantage for one University over others, the corporate offence might be committed. With competition



for overseas students likely to intensify, proportionality in agency fees may be something worth keeping an eye on.

## **CONCLUSION**

Dealing with the Act will be a matter of diligent but proportionate risk management, identifying risks and creating adequate procedures to deal with them. The Act and its implications are hot topics in corporate governance and, based on the adequate procedures guidance amongst other things, it seems likely that some form of generally standardised approach will emerge. However, it is important that each University addresses the issues in its own specific context and in relation to its own specific risks.

What is very important, though, is not to wait until the Act comes into force to implement the required measures.

For further information please contact Professor Stewart Brymer: [stewart@brymerlegal.co.uk](mailto:stewart@brymerlegal.co.uk), 0333 2400 313, or 07801 034530. As well as practising on his own account through Brymer Legal, Professor Brymer acts as a consultant to the Education Sector Group at MacRoberts LLP, Edinburgh and Glasgow.

This note is provided for information only and does not constitute legal advice.

June 2011