A "COMMON SENSE" GUIDE TO THE BRIBERY ACT 2010

Good Business Ethics
Makes Good Business Sense

ICAS

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A PRACTICAL GUIDE FROM ICAS

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1 FOREWORD

The Bribery Act 2010 became applicable on 1 July 2011. The introduction of this Act has put the UK at the forefront of the fight against corruption and has already resulted in action being taken. There can be little doubt that in certain respects the Act puts the UK at a commercial disadvantage in the short-term as companies compete in certain economies where corruption is still rife. However, ICAS supports the stance taken by the UK Government in its efforts to create a more ethical global business environment. We also believe that the UK Government should do more to lobby G20 members and other countries to adopt a similar stance on bribery – ideally what is really needed is a common approach to reducing the level of corruption that exists.

The results of recent research from Ernst & Young has surprisingly revealed that 72% of middle managers of UK organisations are still not aware of the UK Bribery Act. Additionally, the research revealed that only 55% of those middle managers who had heard of the Act believed that they had received adequate training on its implications. Despite there being only one minor court case to date, a number of investigations are currently ongoing and businesses must ensure that they take the Act very, very seriously.

Recognising the impact of the Act and the apparent lack of awareness in UK businesses, the ICAS Ethics Committee has produced this guidance to assist members and others in organisations to ensure that they have properly assessed the risks to their business. In a number of cases the risks may be small but businesses should ensure that they maintain their vigilance. Additionally, many smaller businesses are now doing business with entities in markets around the globe, some of which are located in countries which do not have a good track record on fighting corruption.

Those businesses which act in an ethical manner should have nothing to fear from this legislation. However, businesses can help themselves by undertaking appropriate risk assessments on a regular basis and ensuring that they have sufficient and appropriate controls in place to mitigate the impact of any risks that they might have identified. I believe that members and others in business will find this guidance very useful in helping them to mitigate the risk that their respective organisation will be charged with an offence under the Bribery Act 2010.

Ian Paterson Brown

Convener, ICAS Ethics Committee

September 2012

2 BACKGROUND

2.1 Applicable date

The Bribery Act 2010 (the "Act") came into force on 1 July 2011. It was not retrospective in effect but, in a number of respects, it simply restated existing UK law at that time.

2.2 Government guidance

The Ministry of Justice's (MOJ) guidance on the Act (the "MOJ Guidance") published in March 2011 can be downloaded at www.justice.gov.uk/legislation/bribery. This includes a Quick Start guide which highlights the key points of the Act.

2.3 Objective of the Act

"You can't legislate for what is ethical but you can legislate for what is unethical."

The Act is intended to place the UK at the forefront of the battle to eradicate the payment and receipt of bribes and to ensure fair competition across the globe; it is therefore welcomed by ICAS and all those who wish to see a more ethical global business environment. The Act undoubtedly brings risks to the competitiveness of UK businesses operating in certain jurisdictions and markets, but it has to be hoped that the Act will act as a catalyst to force the rest of the world to follow suit. Additionally, it may make UK plc more attractive to investors who focus on good corporate governance.

2.4 Offences

Under the Act there are four offences, as follows:

(i) offering, promising or paying a bribe (section 1);
(ii) requesting, agreeing to receive or accepting a bribe (section 2);
(iii) bribing foreign public officials with the intention of securing or retaining business or of obtaining a business advantage (section 6); and
(iv) the corporate offence of the failure of a commercial organisation to prevent bribery (section 7).

The Bribery Act (unlike the US Foreign Corrupt Practices Act) does not provide any exemption for facilitation payments (i.e. small bribes or "grease payments" as they are sometimes referred to). This is the case no matter how small the payment or how well-established the practice is in any jurisdiction, unless permitted by applicable written local law (which will be rare). The MOJ Guidance referred to above (para 2.2) does not water that down, but does provide some clarification on the likely treatment of such payments. In particular the MOJ Guidance recognises the problems that commercial organisations face in some parts of the world and in certain sectors - and that eradication of such payments is a long-term objective.

Section 7 Offence

It needs to be highlighted that The Act introduced a new offence under section 7, whereby a commercial organisation is liable if a person 'associated' with it bribes

another person intending to obtain or retain business or a business advantage for the organisation. A person associated with a commercial organisation is defined at section 8 of the Act, as a person who 'performs services' for or on behalf of the organisation. This person can be an individual or an incorporated or unincorporated body. The capacity in which a person performs services for or on behalf of the organisation does not matter, so employees (who are presumed to be performing services for their employer), agents and potentially subsidiaries are included.

Section 8(4), however, makes it clear that the question as to whether a person is performing services for an organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and the organisation. The concept of a person who 'performs services for or on behalf of' the organisation is intended to give section 7 broad effect so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation's behalf.

Where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of sub-contractors, an organisation is likely only to exercise control over its relationship with its contractual counterparty. Indeed, the organisation may only know the identity of its contractual counterparty. It is likely that persons who contract with that counterparty will be performing services for the counterparty and not for other persons in the contractual chain. The principal way in which commercial organisations may decide to approach bribery risks which arise as a result of a supply chain is by employing the types of anti-bribery procedures referred to elsewhere in this guidance (e.g. risk-based due diligence and the use of anti-bribery terms and conditions) in the relationship with their contractual counterparty, and by requesting that counterparty to adopt a similar approach with the next party in the chain.

Organisations should review the contracts which they have in place, and those which they propose to put in place, to ensure that suitable obligations are assumed by the contractual counterparty. Consideration should also be given to ensuring that appropriate rights to audit, and to terminate in the event of a breach, are incorporated into the contract.

2.5 Scope of the Act

The Act is applicable in all parts of the United Kingdom but its impact is wider than that, as wording of the Act also makes it clear that the location of where the offence is committed is irrelevant. The offence falls within the ambit of the legislation (e.g. with regards to offences committed overseas), and UK courts will have jurisdiction if the person committing the offence has a close connection with the UK. 'Close connection' is deemed as being a British national or a person ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.

Furthermore, under section 7 of the Act (failure of commercial organisations to prevent bribery), a commercial organisation can be held liable for conduct amounting to a section 1 (active bribery) or section 6 (bribing a foreign public official) offence on the part of an associated person who is neither a UK national or resident in the UK, nor a body incorporated or formed in the UK. The location of the Act or omission under section 7 is irrelevant; provided the business is incorporated or formed in the UK or it carries on a business or part of a business in the UK, then the UK courts will have jurisdiction (section 12). Also for the commercial organisation to be prosecuted under section 7, the associated person does not even need to have been prosecuted.

2.6 Penalties

The penalties established highlight the seriousness the Government is placing on the offence, with the maximum sentence for someone found guilty of committing the offence of bribery being ten years and/or an unlimited fine with corporate entities also subject to an unlimited fine.

In Scotland, the Lord Advocate introduced a trial initiative to encourage businesses to "self-report" bribery offences. Under the initiative, where businesses self reported conduct within their organisation which may have amounted to an offence under the Act (or under the law before 1 July 2011), the Crown could decide to refer the case to the Civil Recovery Unit rather than instituting criminal proceedings. At the time of publication, no announcement has been made on whether the trial period, which ended on 30 June 2012, would be extended. Any such announcement would be made via the Crown Office website: www.crownoffice.gov.uk.

The initiative is similar to a scheme operated in England, Wales and Northern Ireland by the Serious Fraud Office (SFO) and there will be continuing liaison between the Crown Office in Scotland and the SFO in cases where there are cross-border issues.

The Crown Office and Procurator Fiscal Service (COPFS) has also issued guidance which sets out in detail how reports should be made and the criteria COPFS will apply when assessing self reported cases. A link to the COPFS Guidance can be found in Appendix 2.

2.7 Objective of ICAS guidance

In producing this "Common Sense" guidance, the ICAS Ethics Committee is seeking to help ICAS members in particular, mitigate the risk of breaching the Act. We are also hoping to increase the awareness of the Act and its implications on UK business.

3 INTRODUCTION

3.1 Need for a level playing field business environment

Being able to compete in business is like being able to compete in sports – you need a level playing field to ensure that no-one is able to benefit from an unfair competitive advantage. While anti-doping seeks to remove the use of stimulants or performance enhancing drugs from an athlete's preparation, the same is true of the Bribery Act 2010 with respect to business. In passing this legislation, the UK is seeking to outlaw practices which restrict or prohibit free trade. Whilst sport has not eradicated drugs from its arena, it has, over the last 20 years, undoubtedly cleaned up its act. Countries and businesses around the world are waking up to the need to follow suit, and as more countries and businesses adopt anti-bribery policies and procedures supported by an appropriate legal environment, free trade will prosper. The Organisation for Economic Cooperation and Development (OECD) is also exerting pressure on Governments around the world to take a much tougher stance on bribery.

3.2 Good ethics means good business judgement

In sport, a bribe is seen as cheating and is an ethically unacceptable practice. So what sums up good business ethics when it comes to bribery? Well, in simple terms this is merely a good business judgement in respect of what is right and what is wrong. In order to make a good judgement, someone must be in possession of all the necessary information to make that judgement. This is one of the issues, as on occasion, businesses may be entering into contracts without full knowledge of the counterparty to the contract and also, where applicable, without full knowledge of what an agent will actually do on their behalf. Therefore, it is essential that proper due diligence is undertaken in such situations in order to ensure that decisions can be made with the best information available.

Where the ethical dilemma arises is in the desire to win - that desire to grow market share and expand into new product and service markets and geographical locations. Often the distance or gap between success and failure is marginal and one is always seeking to gain that marginal or incremental advantage over one's peers or competitors. As we all know, there are no prizes for second place. Furthermore, it could be argued that the dilemma is exacerbated at present as many companies seek to find new markets overseas due to the weak position of the domestic economy.

However, one needs to recognise that running a successful, world-class business is not a succession of sprints, but a marathon - or at least, it should be. There is no benefit in short-term gains if your business does not stay the course. The ethical stance is one where a company seeks to build long-term sustainability for all of its stakeholders – not short-term gains for a few.

3.3 Nature of ICAS guidance

In producing this practical guidance, we have sought to bring good judgement and ethics to the forefront, to help businesses adapt to the requirements of the Act.

If individuals and a business behave in an ethical manner, they should have nothing to fear from the introduction of the Act. Ethics and business culture are defined

by the tone set from the top, and as such the processes, procedures, policies and ongoing monitoring of adherence to corporate standards need addressed by the board, relevant committees and management. This tone at the top equally applies in smaller organisations, although we fully appreciate that they will not have the elaborate corporate governance structures of their listed counterparts. This proportionality principle forms a major thrust of the MOJ Guidance.

This guidance from the ICAS Ethics Committee seeks to provide practical suggestions on issues such as policies, processes and procedures, and, where applicable, checklists which can be used as part of the audit trail and governance process to help ensure that businesses do not inadvertently breach the requirements of the Act.

What our guide definitely is not is another legal interpretation of the Act. One of our concerns is that much of what has been produced to date is advocating that you need to take legal advice. We would suggest that businesses are not run by legal departments and that well-defined policies, processes and procedures should allow managers to undertake their day jobs without legal intervention. That said, there will be instances where legal advice is required and good judgement, together with the right internal safeguards, should ensure that in relevant situations sound professional legal input is obtained.

The MOJ Guidance talks about small and medium sized organisations possibly adopting different procedures from those that may be appropriate for a large multi-national organisation. We think this is somewhat simplistic and would encourage boards, audit committees and management to focus on the core issues of Business Model/Nature, Business Sector, and Geographic coverage. While there is often a direct link between size and complexity, we should not conclude that small is always simple, or indeed that big is necessarily difficult. Many smaller businesses are now dealing with customers and suppliers based in countries overseas.

Finally, whilst we have drawn on the content of the MOJ Guidance, we have also sought to create a guide which is practical and provides value added flow diagrams and checklists designed to assist management, boards and audit committees to discharge their oversight duties in relation to monitoring and control. We have also included some case studies in the style of those featured in the highly acclaimed ICAS publication 'Shades of Grey'. The 'Shades of Grey' case studies are now being utilised on a widening international basis and, in the case of China, have been translated into the domestic language.

This practical guidance is aimed at applying common sense and creating a documented audit trail. If followed by business, we hope that such an audit trail would provide prosecutors, defendants and judges with some detail against which decisions and outcomes could be benchmarked until case law becomes established. While we cannot mandate it, we hope that in due course our guide will be used as a reference in any future legal cases brought under the Act. We recognise that currently there is a lack of case law, and until this exists there will be no precedent against which to benchmark evidence, expectations and ultimately judgements. We would hope that our guide may help to fill this void. After all, the foreword to the MOJ Guidance states "combating the risk of bribery is largely about common sense, not burdensome procedures".

As we have already stated, what follows is practical business guidance and not legal opinion.

4 PRINCIPLES AND BUSINESS ASSESSMENT: THE NEED FOR "ADEQUATE PROCEDURES"

4.1 Adequate procedures

If a person "associated" with a commercial organisation bribes another person with a view to obtaining or retaining business or a competitive advantage for that organisation, then the commercial organisation will be liable to prosecution. Because any person who provides services to a commercial organisation is deemed to be "associated" with it, this makes a commercial organisation legally responsible for its associates in a way unprecedented in UK law.

However, a commercial organisation will have a full defence if it can prove that it had adequate procedures in place to prevent persons associated with it from committing the offence of bribery.

The MOJ Guidance states:

"A 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. The commercial organisation will have a full defence if it can show that, despite a particular case of bribery having occurred, it nevertheless had adequate procedures in place to prevent persons associated with it from committing bribery. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities."

The "balance of probabilities" means comparison between the likelihood of truthfulness of different versions of a story – hence the approach discussed below will, we hope, help businesses to be able to demonstrate their truthfulness and adherence to the Act.

4.2 Principles

'Adequate Procedures' are not defined in the Act or MOJ Guidance. Instead the Guidance sets out six guiding principles, each followed by commentary and examples. The principles are:

- proportionate procedures;
- top level commitment;
- risk assessment;
- due diligence;
- communication and training; and
- monitoring and review.

These principles are explored in greater detail in section 6 of this guidance.

Guidance from the SFO and the Director of Public Prosecutions (the prosecuting authorities in England & Wales) makes it clear that the existence (or not) of robust anti-bribery prevention procedures will be a key factor in influencing the decision of whether to prosecute.

The onus will be on the organisation to prove that it had adequate procedures in place to prevent bribery. Ultimately, this will be determined by the courts, taking into account the particular facts and circumstances of the case. The emphasis in the MOJ Guidance is on developing a risk based approach to eliminate bribery in all its forms.

We believe these 6 principles are the most important and relevant part of the MOJ Guidance. While we have replicated or expanded on other areas, as appropriate, we believe that satisfaction of the 6 principles will form the basis of any defence in cases brought under the Act. Furthermore, these principles should be embedded at the core of any proper business governance structure rather than simply being viewed with the objective of forming the basis of a possible defence in a legal case at a later date. This, we believe, is fundamental in seeking to ensure that a business is properly run.

4.3 Business assessment

For our part, we have added throughout a practical approach which is pertinent to all organisations. This approach, which effectively encompasses an overall high level business assessment as its starting point, focuses on:

- business model/nature of business;
- business sector; and
- geographic coverage.

This business assessment will form the overarching basis for an organisation's strategic risk assessment, and will in turn drive tailored anti-corruption processes designed to provide the most robust defence under the Act. We believe this to be a very effective tool for business risks, and not just those which arise by virtue of the introduction of the Act.

5 RISK ASSESSMENT

5.1 Purpose

The risk identification and assessment process with regards to bribery is no different from seeking to assess other risks in a business and, as such, should fit into the strategic and operational risk management processes that currently exist within an organisation. It is also true that the biggest risk that organisations run is the one they have not yet identified – the recent financial crisis is testament to this.

5.2 Ongoing process

While the content of this guidance should help in the risk identification process, there is no substitute for having the right group of senior people to brainstorm the issue and to seek to identify all the current or potential risks. Businesses should also recognise that change creates not only opportunities but new risks; as such, risk identification and assessment is a living process. Both at the strategic and operational level, risks related to bribery should be built into the day to day business processes. Bribery risk requires to be embedded in each business's processes, and not treated as something that sits at the side of the business or indeed resides within a legal or compliance department.

5.3 Processes, procedures and controls

Once the risks in relation to the Act have been identified and assessed in their naked form, we require, as with any other risk, to look at the processes, procedures and controls that exist. Where these are deemed to be either inappropriate or insufficient:

- the policies and procedures must be changed to ensure that they are fit for purpose; and
- the necessary monitoring and reporting functions must be introduced or strengthened, to ensure that nothing gets overlooked or is allowed to fall between the cracks.

Users are directed to the checklist on page 36 which covers this area. Please note that the content on page 36 is of a general nature and needs to be specifically tailored for each particular organisation.

6 THE SIX PRINCIPLES IN DETAIL

6.1 Purpose of principles

The six principles identified by the MOJ Guidance (see paragraph 4.2) should inform the structuring of an organisation's procedures and processes to best prevent, and if applicable, detect breaches of the Act. The MOJ Guidance and the Act clearly recognise that "no bribery prevention regime will be capable of preventing bribery at all times". Having said that, in order to successfully defend a bribery prosecution, an organisation will have to demonstrate that it had in place "adequate procedures" – that is procedures which were, on the whole, successful in preventing bribery.

6.2 Principle 1 – Proportionate procedures

In looking at the principles and our high level business assessment, we have borrowed the following comment from the foreword by Kenneth Clarke, the former Secretary of State for Justice, to the MOJ Guidance:

"Combating the risks of bribery is largely about common sense, not burdensome procedures. The core principle it sets out is proportionality."

It is interesting to note that the word "proportionate" is mentioned around 60 times in the final MOJ Guidance, whereas the initial draft mentioned the word just three times. Clearly there was a fundamental change in the tenor of the Guidance and recognition that proportionality is at the heart of what is expected from businesses.

So what does proportionate mean? One definition might be "the relation of one thing to another in magnitude". If one reads the MOJ Guidance, you could draw the conclusion that size matters and that, the larger the business, the more that is expected. We would not draw this conclusion and, as indicated in the introduction (paragraph 3.3), we see complexity as more relevant than size. We believe that proportionate should be linked back to the risk assessment. This we believe is important on two counts:

(i) Firstly, the greater the risk, the more effort that needs to be put in to monitoring and controlling the risk of bribery. The anti-corruption processes must be proportionate to the level of risk i.e. targeted in a more concentrated way at the assessed higher risk aspects.

(ii) Secondly, the greatest risk a business runs is the one it has not yet identified. If a board and management has undertaken a detailed, professional and documented risk assessment and followed that through into its processes and kept both the risk assessment and processes fully updated and monitored, then it should be able to prove that it has acted proportionately. If the business has followed a rigorous proportionate process, the fact that it has not identified a particular risk should not necessarily mean that it does not have a defence of adequate procedures.

Whilst "proportionate procedures" is undoubtedly an important principle, unfortunately, until we have case law in this area, it will be difficult to define what is, or is not, proportionate.

We can only hope that the judiciary also applies common sense in relation to determining what is proportionate in the particular circumstances of a case.

Under proportionate procedures, the starting point for any business should be to review its business model/nature, business sector, and geographic coverage. While the checklists (see section 10) will give you a better appreciation of the detail to be considered, it is common knowledge that there are different countries, industries and business models which are more prone to bribery risk. A business that operates through agents, sub-contractors and joint ventures is much more difficult to control, transparency is removed and the risk increases. A commercial organisation will in all likelihood be legally responsible for these parties, on the basis that they are providing services to it. Move the location from the UK to overseas and the risks further escalate.

As such, some basic common sense research or due diligence is required. With the advent of the internet and the sharing of information, the scope of your research is only limited by a function of imagination and time. However, treat information received second-hand, or via the internet, or other medium of which you have no knowledge, with care. Keep the formulation of procedures proportionate to the risk, and make sure you can have confidence in the reliability of the information on which you base your assessments. That said, there are a number of useful websites (please refer to appendix 1).

The MOJ Guidance states "procedures may be stand alone or form part of wider guidance". From an ethical standpoint, we believe that procedures should always be embedded into a business's full processes. Failure to do this risks the anti-bribery procedures being entirely ignored or being seen more generally as "nice to have" but not essential. Unless fully embedded in the wider risk procedures, the risk to the organisation is undoubtedly increased.

While many organisations will have appropriate procedures in place, there will be some where it is necessary retrospectively to apply procedures to existing employees, agents or contractors. It will be no defence to say "Mr X has worked for us for 10 years, is trusted and there has never been an issue before", if he is allowed to operate outside your new procedures and processes.

Also, at the same time as reviewing policies, it would be appropriate to demonstrate a wider consideration of bribery, by having an audit trail of consideration of the following points:

- does the business have a strategy to implement anti-corruption policies?
- does it include a public commitment to bribery prevention?
- what steps have you taken to make these policies publicly available, so that your stakeholders are clear where you stand regarding your commitment to stamping out corruption and supporting trade-led development?

All of this would help to demonstrate a commitment, not only to the detail of the legislation, but also to the spirit of the legislation.

Finally, the MOJ Guidance talks about unethical conduct on the part of associated persons.

The ICAS Ethics Committee believes that this gets to the very core of what this legislation is all about. Unethical conduct is about achieving a commercial benefit through unfair means, or through some form of underhand means not available to your competitors. The acid test is this:

- Would you be happy to stand up and publicly explain to your stakeholders and possibly the public at large, via the media, why you were successful?

If the answer to this question is "no", then you are probably about to embark on unethical conduct and might be about to breach the Act.

So the key guidance is this:

- think before you act, and
- discuss the matter and your proposed actions or inactions with your colleagues.

If there is doubt, and if you decide to proceed, ensure that a proper audit trail exists which clearly illustrates how the decision was arrived at and what matters were considered and by whom.

The detailed checklists in section 10 contain a list of questions which are designed to assist in guiding your thinking with respect to such matters.

6.3 Principle 2 – Top-level commitment

To foster a culture within an organisation requires the tone to be set by the leaders in the business – often referred to as the "tone at the top". This tone from the top is not restricted to bribery; it covers all forms of corporate behaviour. Not only do people at the top of the organisation need to be involved in defining the policies and procedures; they also need to walk the talk. There is no point in establishing corporate values if those at the top do not live and are not seen to live by those values. Ethical behaviour in a business comes from ethical conduct and ethical leadership. Only appropriate ethical leadership can seek to ensure that an organisation has an appropriate ethical culture embedded within it. As such, you will only succeed in any defence if you can clearly demonstrate that there was, and remains, a top level commitment to seeking to prevent bribery. This commitment requires to be transparent and visible to all in the organisation. In formulating your overall stance via policies, training etc., you will need to carefully consider the "tone at the top".

As indicated earlier, there is both an internal exercise to conduct and internal audience to address and also an external audience to consider. Directors will be more effective in setting the right culture and living the values, if the external world knows the expected level of behaviour. One-off assessment exercises, communication and training will not suffice – the whole process needs to be embedded in the thinking and actions of all in the business, and part of the corporate message and values.

While the MOJ Guidance explores the range of commercial entities from smaller organisations to multinational organisations, common sense should be applied in the development of a business's processes, monitoring and overall stance, and this is clearly encapsulated in the following approach:

- it should be appropriate;
- it should be proportionate;

- it should be effective; and
- it should be part of the day job.

Such an approach should help to ensure that this remains a live issue under continuous consideration and not something considered only on an ad hoc basis.

Further detail is provided within the checklists in section 10.

6.4 Principle 3 – Risk assessment

The ICAS Ethics Committee views 'Risk Assessment' as the fundamental starting point and as such has included a separate section on this principle. What follows in this section should be read in conjunction with the separate section on 'Risk Assessment' on page 9.

The MOJ Guidance suggests that the risk assessment can be part of a business's wider processes or standalone.

Whilst bribery risk can be assessed as part of a wider process, regardless of the size of the organisation, risk assessment should be embedded into an organisation's day to day processes and procedures. Any assessment is an ongoing process demanding periodic review and any consequential changes implemented. The assessment needs to recognise that risks that can impact on an organisation can be both internal and external, and sometimes collusion can mean that both internal and external parties are engaged in the same risk.

Organisations therefore will need to assess the level of probability of risks being either internal or external or (in the event of collusion), where internal and external parties are engaged in the same risk, and seek to mitigate the threat as appropriate. It should also be recognised that businesses are living dynamic entities and as such risks will evolve and change over time. Entry into new markets, products or international diversification will often, if not increase the risk profile of the business, at least dictate a reassessment of risk. This therefore drives a sensible and proportionate due diligence process which is covered under Principle 4 (Due Diligence) and is part of the risk assessment process.

Finally, the MOJ Guidance on Risk Assessment highlights five "Commonly encountered risks" which we have sought to build into our checklists in section 10 but have included the headings below for sake of completeness:

- country risk;
- sectoral risk;
- transaction risk;
- business opportunity risk; and
- business partnership risk.

The definitions of the above have all been included in Appendix 1 with the wording having been lifted from the MOJ Guidance.

6.5 Principle 4 – Due diligence

Due diligence is most widely associated with mergers and acquisitions and is both widely accepted and an essential element of good corporate governance. Proportionate due diligence in this context is simply the application of basic common

sense and sensible commercial practice. Who are you dealing with/do you propose to deal with? What is the business environment? Where do you propose to conduct the business – is it in a country or sector in a higher risk category? In undertaking due diligence, one is seeking to obtain a good understanding of a business or opportunity (or indeed potential business contact), clearly identifying any risks and seeking to put in place appropriate procedures, processes or actions to mitigate the risks identified. Depending on the nature of the event and hence the due diligence, it might be bribery specific or part of a more general overall review process. For example, appointment of an overseas agent could be bribery specific, whereas the acquisition of an overseas business would, by definition, be more expansive.

In undertaking due diligence, it is often relevant to engage external parties, define the scope and agree the format of the report. Regardless of the party undertaking the work:

- the scope and output of the work should be defined up front;
- the due diligence work should be monitored as it is conducted; and
- the scope, depth and coverage will evolve as the work is conducted, but there is a requirement for it to be proportionate.

The MOJ Guidance emphasises that due diligence procedures should be proportionate to the identified risk. However, we would seek to address this slightly differently – we believe due diligence procedures should also:

- define when due diligence is required;
- define when external specialists require to be involved in the process;
- seek to uncover risks or issues that have not been identified; and
- recognise that in foreign destinations, different cultural, legal and business practices exist.

Part of the due diligence process will involve an understanding of these additional factors and how they impact on the risk assessment and the need for appropriate and proportionate procedures.

While the checklists in section 10 provide more guidance on due diligence, a good starting point in defining scope and nature is obtained by looking at:

- business model/business nature;
- business sector; and
- geographic coverage.

6.6 Principle 5 – Communication (including training)

As we have identified earlier, there are two audiences – an internal audience who need to live the values, and an external audience who need to understand and observe the values. As the MOJ Guidance says:

> "Making information available assists in more effective monitoring, evaluation and review of bribery prevention procedures".

One needs to recognise that the format, content and frequency of internal and external communication will differ, but the core message needs to be consistent, clear and understood, regardless of the audience. If the core message is, for example, "we support sound ethical business practices that create the conditions for free markets to

flourish", this message needs to be reflected in all communications. Communication internally needs to focus on policies, procedures and awareness, linking them in with the corporate values. Part of the internal communication is the message sent to the organisation by the behaviour of the people in it. The tone and example is set by the people who employees report to, not the people who report to managers. So behaviour is an essential part of the communication strategy (see also principle 2 "Top-level commitment").

The words "appropriate and proportionate" are referred to repeatedly in this guide and the MOJ Guidance. These words are particularly relevant to the communication of a company's bribery prevention regime. If the communication strategy is about setting the scene, then training is about converting theory into reality. No amount of good communication will create an ethical entity unless the employees, associated persons and others are trained so they can walk the talk.

While training will need to cover all persons, the focus, regularity and level of detail will be the result of the risk assessment. The type of training will also vary depending on seniority, role and the assessment of an individual's ethical standards and values. That said, we are all mortal and as such nobody can be excluded from training and review, as we will all at some stage encounter temptation. It is important we recognise that and have the moral courage to take the right course of action, and training is a key part of preparation for dealing with such events.

Training should focus on:

(i) what is the Bribery Act all about?
(ii) what are the risks?
(iii) how can I identify risks that may lead to bribery occurring or actual instances of bribery?
(iv) how do the requirements of the Act impact on my job?
(v) how can I help prevent bribery from occurring?
(vi) what do I do if I believe I have identified bribery?
(vii) what else should I be doing?

The expression "forearmed is forewarned" rings true. The MOJ Guidance also talks about "Speak up Procedures" which encompass a secure, confidential and accessible means for internal or external parties to raise concerns about bribery and to provide a forum for improvements of bribery prevention procedures.

While we have again expanded the range of issues under our checklists in section 10, there is no substitute for a clear, concise message that is regularly communicated and embedded in the organisation.

To plagiarise the words of a former US President: "It is not about what your company can do for you when it comes to combating bribery; it's about what you can do for your company. People make it happen – not corporations".

We would also advocate that the case studies included at section 11 can provide a very useful training medium, as bringing the issues to life can create a clearer understanding for employees and provide practical experience of identifying and dealing with bribery issues. We would also suggest that providing examples of unacceptable behaviour is helpful in bringing policies and procedures to life.

6.7 Principle 6 – Monitoring and review

The expression "what gets measured gets done" is very true and so principle 6 seeks to ensure that there is an effective monitoring and review mechanism in place. What constitutes effective monitoring and review will differ from one organisation to another, and will also change over time as the organisation develops and changes. It should also be recognised that external factors will change – e.g. change of government, regime or law in countries in which the organisation operates. Additionally, as recent events have shown in the Middle-East, change can occur at a very rapid pace. Additionally, internal factors may also be subject to change e.g. new individuals (perhaps coming from less rigorous backgrounds), new owners, directors, new subsidiaries, new products, services and markets etc.

As such, we recommend periodic reviews to see if an organisation's monitoring and review regime is still proportionate and appropriate. Some organisations may wish to define trigger points or specific events which would necessitate a reassessment of the monitoring and review currently in place, and the trigger points or specific events which would necessitate a more fundamental review of the principles of proportionality, top-level commitment, risk assessment, due diligence, communication and training. Some organisations may wish to seek external input on such re-assessments in order to bring a fresh perspective to the process.

Within our checklists, issues of a more detailed nature are addressed but organisations should be seeking to use a wide range of information sources and tools, both internal and external, to monitor and review their activities. Data from government bodies, trade bodies, regulators and competitors will all be relevant in ensuring an organisation's procedures are still proportionate. Staff surveys, feedback and training will also provide valuable sources of information with regards to effectiveness.

6.8 Conclusion re principles

What is important to understand is that the 6 principles do not stand in isolation – properly implemented, they form part of the virtuous circle which will enable your organisation to combat bribery and establish the defences against an action under the Act.

This is not just about preventing an action under the Act; it is about shareholder value, reputation and creating long-term economic prosperity for your stakeholders. Businesses should see this as an opportunity as well as a challenge.

7 POLICIES, PROCEDURES AND PROCESSES

7.1 Embedment is essential

The three P's: policies, procedures and processes, represent the pillars upon which a business should seek to build its day to day operational defences against breaches of the Bribery Act. That said, having the three P's in place will be no defence, if you cannot demonstrate they are embedded into the day to day practices of your business and your employees' behaviours. This is what "good business ethics in practice" looks like. Required behaviour can be described in codes but this must be translated into reality.

7.2 Policies

The policies that should be put in place are as follows:

- policy on inducements, reciprocity and bribery;
- policy on whistle blowing;
- policy on corporate values;
- policy on entertainment (received, given and, when required, refused); and
- other policies as required (e.g. overseas travel).

In its policies, an organisation should seek to communicate that a bribe can be active (making or giving a bribe) or passive (receiving or accepting a bribe). It should also be recognised that offering, promising, requesting or agreeing to receive bribes are all offences under the Act. As such, an organisation will require to be specific and provide clear examples in support of its policies.

Companies will, as an absolute minimum, require to review the policies they currently have in place with a view to determining whether any changes are required. Where changes are made, which includes the introduction of new policies, the company must ensure that these are communicated to their employees. The expression "tone at the top" has become accepted as part of the new business language – but it needs to be embedded in the corporate ethos and in particular in the policies put in place in respect of bribery. The board and executive directors in an organisation therefore need to lead from the front by living the policies on a day to day basis.

7.3 Procedures

All areas of a business will have procedures. Often, these are retained on an intranet, ensuring all staff have direct access to one version, hence reducing the risk of persons complying with out-of-date procedures. But remember, whilst intranets are useful repositories of information, experience tells us that just because a policy is on your intranet does not mean anyone (apart from your compliance officer) has ever read it. That is where training and monitoring come in.

It will be necessary to link your review/assessment of procedures back to the risk review. This will guide you as to what procedures are key and what procedures need to be reviewed in more detail.

A good example would be HR policies regarding recruitment. What background checking requires to be done when a new person is hired or what terms need to be built in to his or her contract? Indeed, some businesses may wish to undertake annual checks on their employees, or a selection of them and this may require changes to procedures and in some cases employment contracts.

7.4 Processes

These are the way that things get done in a business. For repetitive actions there is normally a well defined and well trodden path – for example, in recruitment or invoice payment. Businesses need to devise processes that address areas of risk, for example recruitment, contract negotiation, invoice payment and expenses, and ensure that the process and controls are both appropriate and proportionate given the possible level of risk identified. It would also be appropriate for high risk or dependency processes and controls (e.g. contracts with overseas parties) to be documented and on an ad-hoc basis be independently reviewed by internal audit or a senior independent party to ensure they are operating as documented and understood. Put yourself in the position of a fraudster – how would you extract value from a situation or company?

7.5 Anti-corruption Compliance Officer

Consider appointing an Anti-Corruption Compliance Officer as the person within an organisation (at a senior level) who is the primary point of contact on anti-corruption issues.

7.6 Conclusion

The Act has brought challenges to all businesses, and this common-sense guidance is aimed at helping businesses respond appropriately and effectively in meeting these challenges. Every situation will be different and may require different formats to be followed. However, overriding everything else, where there is, or may be, a possible incidence of bribery:

- act with speed;
- escalate;
- act on the facts, not rumours;
- properly investigate;
- bring in experts as required;
- seek to manage the situation – risk and reputation; and
- above all else, DON'T IGNORE IT.

8 FLOW DIAGRAMS

8.1 Purpose of flow diagrams

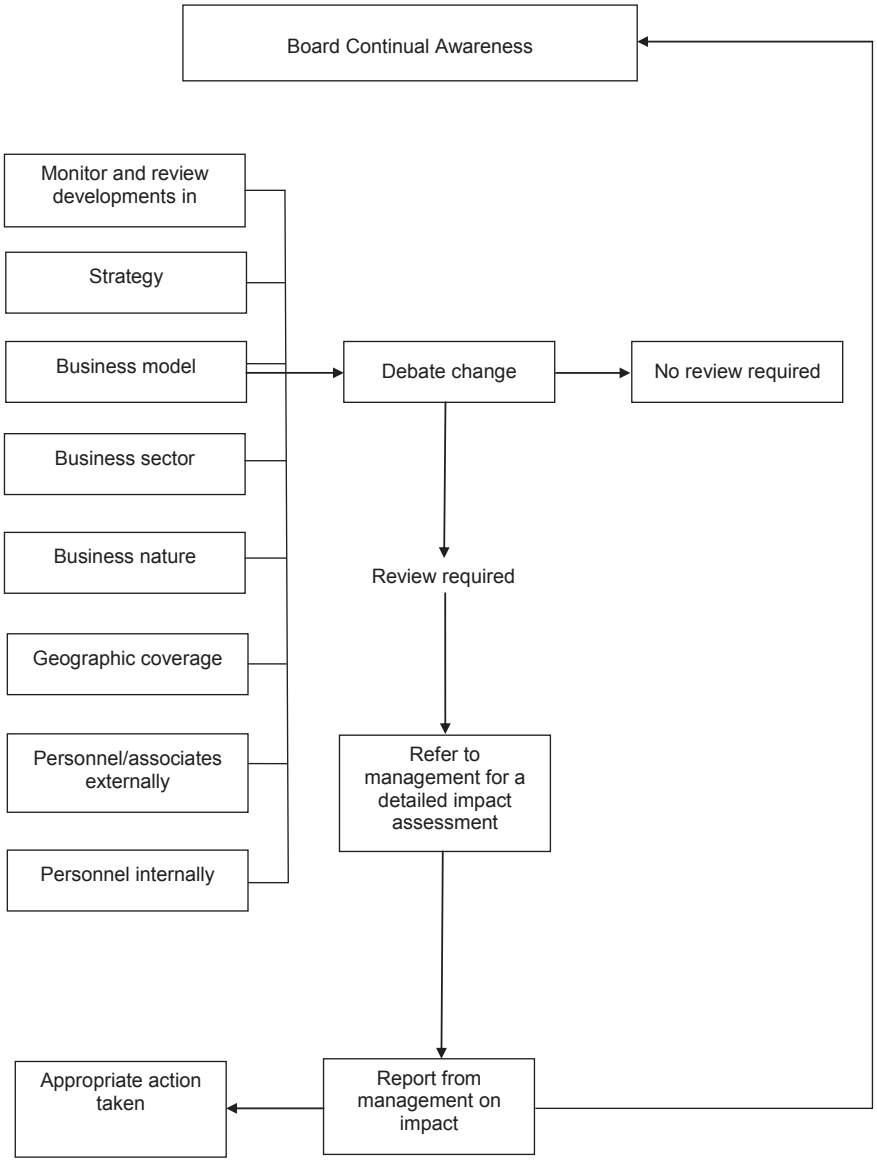
The following flow diagrams have been included to illustrate the types of procedures that organisations need to consider with regards to ensuring that they have appropriate and proportionate procedures in place. The flow diagrams are provided to assist organisations but would need to be adapted to meet their specific circumstances.

8.2 Matters covered

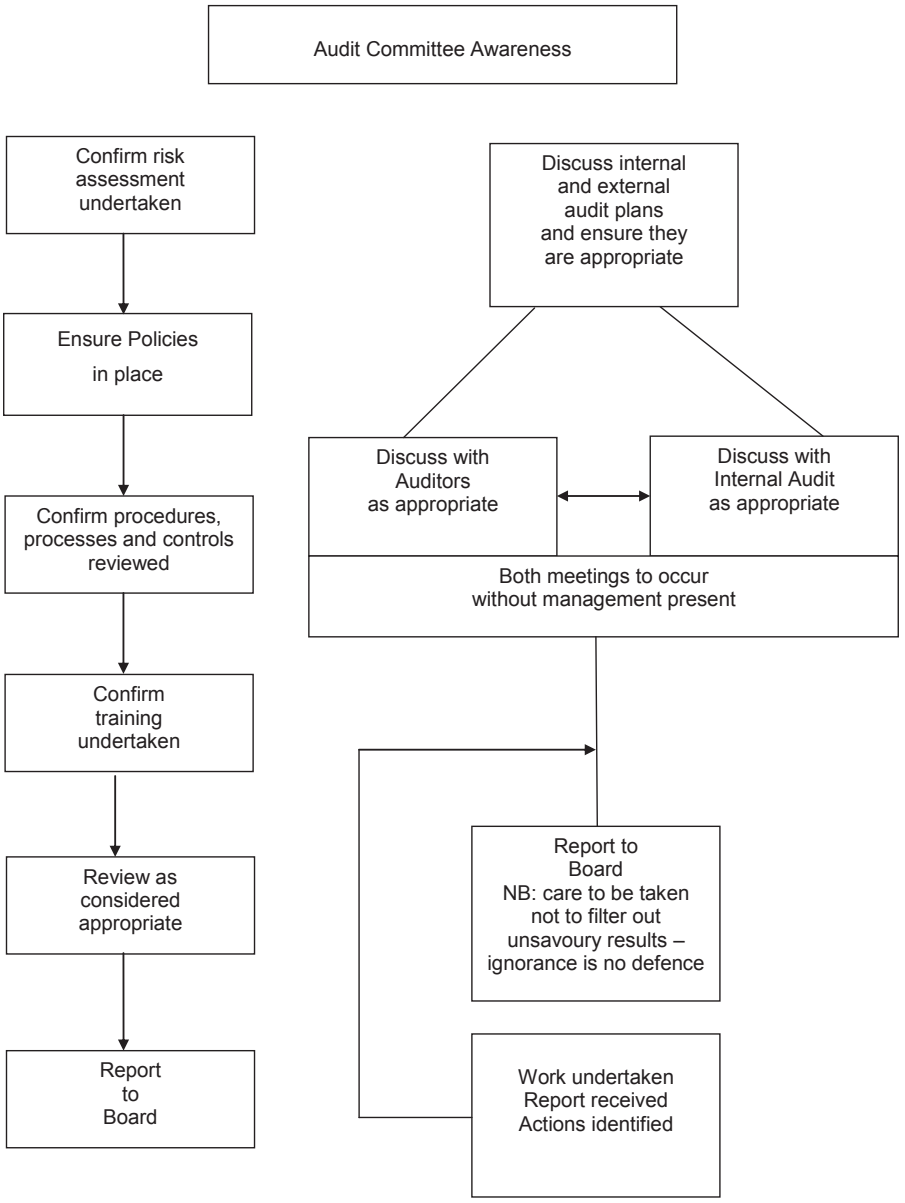
The flow diagrams cover the following matters:

(i) board continual awareness (section 8.3);
(ii) audit committee awareness (section 8.4);
(iii) management awareness/action (section 8.5); and
(iv) discovery of possible bribery incident (section 8.6).

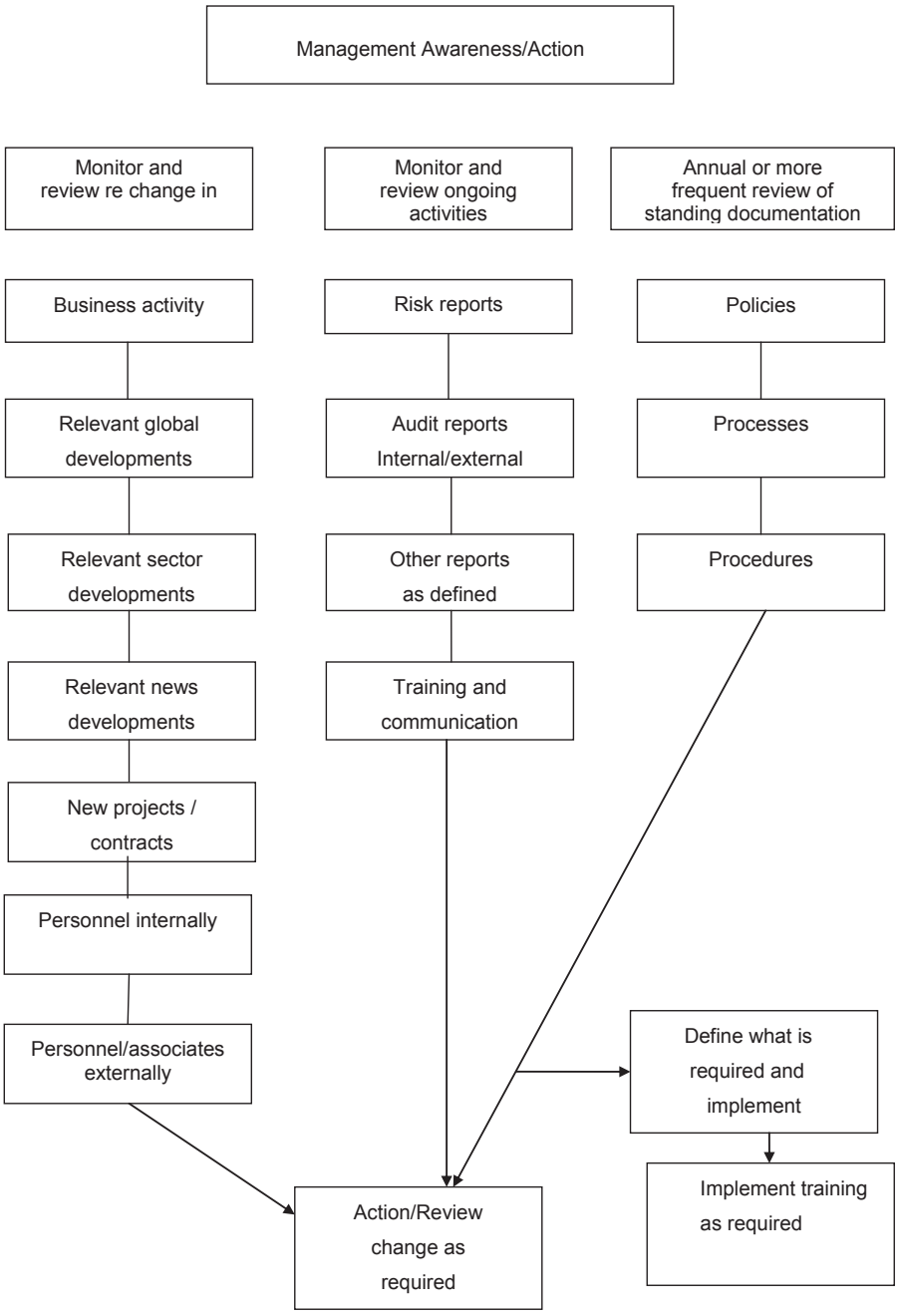
8.3 Board continual awareness



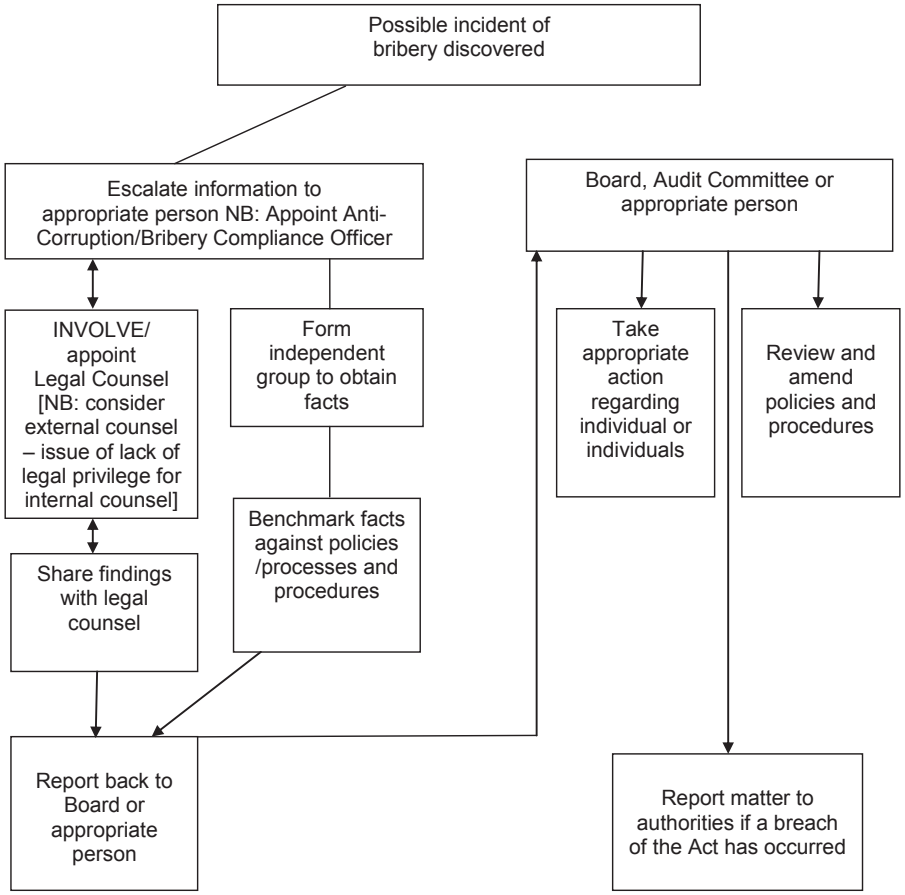
8.4 Audit Committee awareness



8.5 Management awareness/action



8.6 Discovery of possible bribery incident



It should be recognised that every situation will be different and require different formats to be followed – the overriding issues are:

- act with speed;
- escalate;
- act on the facts not rumours;
- properly investigate;
- bring in experts as required;
- seek to manage the situation – risk and reputation;
- don't ignore it;
- NB: aim should be to secure legal privilege; and
- consideration should also be given to additional reporting obligations under Anti Money Laundering rules for businesses in a regulated sector.

9 OTHER PERTINENT MATTERS

9.1 Matters not covered by the Act

The Bribery Act 2010 is not directly concerned with:

- fraud;
- theft;
- books and records offences;
- Companies Act offences;
- money laundering; and
- competition.

While all of these are matters that directors, managers and companies obviously need to be aware of, save for obligations to make reports to the Serious Organised Crime Agency (SOCA) under Money Laundering rules, they are not directly relevant to the Bribery Act 2010 and fall outwith this practical guidance.

9.2 Relevant commercial organisation

The MOJ Guidance also states:

> "Only a 'relevant commercial organisation' can commit an offence under section 7 of the Bribery Act. A 'relevant commercial organisation' is defined at section 7(5) of the Act as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation. The key concept here is that of an organisation which 'carries on a business'. 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."

This means that given the vast majority of organisations conduct some sort of business (even, for example, universities and colleges with ancillary commercial activities) this definition has a widespread impact.

9.3 Reasonableness test

Also helpful is the part of the MOJ Guidance which states:

> "For the purposes of deciding whether a function or activity has been performed improperly the test of what is expected is a test of what a reasonable person in the UK would expect in relation to the performance of that function or activity."

9.4 Customs, culture and business ethics

The Act, under section 6, deals with bribery of foreign public officials. It is particularly relevant as the Act is recognising that in certain parts of the world, customs, culture and business ethics differ from the UK and the developed world. It is no accident that

many of the case studies feature overseas activities. The MOJ Guidance is helpful in that it defines what is included by "foreign public official" and draws specific reference to acts falling under written law applicable to the foreign official.

9.5 Bribery of a foreign public official

The MOJ Guidance states:

> "Section 6 creates a standalone offence of bribery of a foreign public official. The offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions. The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so. However, the offence is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage."

It is relevant for organisations to seek local legal advice if there is any concern, as local practices, case law and legal interpretations may be important considerations in arriving at the right interpretation, action and answer.

9.6 Hospitality

The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes. It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes.

Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, to better present products and services, or establish cordial relations, is recognised as an established and important part of doing business. It is not the intention of the Act to criminalise such behaviour.

In order to amount to a bribe under section 6, in the case of foreign public officials, there must be an intention for a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage. For everyone (other than a foreign public official) the intention must be not only to secure a financial or other advantage, but that the purpose of the hospitality must be to secure that the person being entertained improperly performs his job or function as a result. For example, if the person entertained has the responsibility for awarding a contract, and that person subsequently favours the company that provided the hospitality, despite that company not fulfilling the criteria for the contract. In this regard, it may be in some circumstances that hospitality or promotional expenditure in the form of travel and accommodation costs does not even amount to 'a financial or other advantage' to the relevant official because it is a cost that would otherwise be borne by the relevant person or company or, in the case of foreign public officials, the foreign Government rather than the official, him or herself.

In looking at hospitality and promotional expenditure it is not only the level of expenditure but also all the circumstances surrounding and linked to the payment, that need to be considered.

While not relevant to the Act, individuals should also carefully consider the reputational issues surrounding hospitality. Many an individual has had his or her career impacted by the acceptance of hospitality which would have not fallen foul of the Act, but, when made public, did not appear a wise decision with the benefit of hindsight.

In considering hospitality, promotional spend or other business expenditure which seeks to improve the image of a commercial organisation or develop relationships, one should carefully consider the following in respect of the proposed expenditure:

- is it appropriate?
- is it proportionate?
- will it achieve or help to improve the image of the organisation or develop relationships?
- would an independent reasonable person deem it sensible if the facts became public?

In setting out their policies and procedures, corporate entities might find it helpful to give examples of what is deemed appropriate and what is deemed inappropriate. It will be necessary to set limits on both recording anything other than very low value items and a level at which approval of a more senior person is required and, if necessary, hospitality refused. These procedures should also ensure that hospitality and gifts which are refused are recorded as this is evidence of the procedures working in practice.

9.7 Joint ventures

The MOJ guidance states:

> "As for joint ventures, these come in many different forms, sometimes operating through a separate legal entity, but at other times through contractual arrangements. In the case of a joint venture operating through a separate legal entity, a bribe paid by the joint venture entity may lead to liability for a member of the joint venture, if the joint venture is performing services for the member and the bribe is paid with the intention of benefiting that member. However, the existence of a joint venture entity will not of itself mean that it is 'associated' with any of its members. A bribe paid on behalf of the joint venture entity by one of its employees or agents will therefore not trigger liability for members of the joint ventures simply by virtue of them benefiting indirectly from the bribe through their investment in, or ownership of, the joint venture.
>
> The situation will be different where the joint venture is conducted through a contractual arrangement. The degree of control that a participant has over that arrangement is likely to be one of the 'relevant circumstances' that would be taken into account in deciding whether a person who paid a bribe in the conduct of the joint venture business was 'performing services for or on behalf of' a participant in that arrangement. It may be, for example, that an employee of such a participant who has paid a bribe in order to benefit his employer is not to be regarded as a person 'associated' with all the other participants in the joint venture. Ordinarily, the employee of a participant will be presumed to be a person performing services for and on behalf of his employer.

> Likewise, an agent engaged by a participant in a contractual joint venture is likely to be regarded as a person associated with that participant in the absence of evidence that the agent is acting on behalf of the contractual joint venture as a whole."

9.8 Facilitation payments

These are small bribes paid to facilitate routine Government action. The use of such payments could trigger either the section 6 offence or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 1 offence and therefore potential liability for a commercial organisation under section 7.

As was the case under the old law, the Act does not (unlike the US Foreign Corrupt Practices Act) provide any exemption for facilitation payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. The provision of exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused. Therefore, the UK government specificallly decided not to provide any exemptions for such payments.

9.9 Duress

The common law defence of duress is very likely to be available in circumstances where individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty.

9.10 Prosecution discretion

> "Whether to prosecute an offence under the Act is a matter for the prosecuting authorities. In deciding whether to proceed, prosecutors must first decide if there is a sufficiency of evidence, and, if so, whether a prosecution is in the public interest. If the evidential test has been met, prosecutors will consider the general public interest in ensuring that bribery is effectively dealt with. The more serious the offence, the more likely it is that a prosecution will be required in the public interest.
>
> In cases where hospitality, promotional expenditure or facilitation payments do, on their face, trigger the provisions of the Act, prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute. The operation of prosecutorial discretion provides a degree of flexibility which is helpful to ensure the just and fair operation of the Act."

While this is helpful guidance and may provide a degree of "safe harbour" for minor incidents of bribery, it should not be relied upon and is no substitute for having in place the proper defences.

Factors that weigh for and against the public interest in prosecuting in England and Wales are referred to in the joint guidance of the Directors of the Serious Fraud Office and the Director of Public Prosecutions: 'Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions'. A link to this guidance can be found in Appendix 2.

See also section 2.6 of this Guidance which has information on The Crown Office and Procurator Fiscal Service (COPFS) initiative to encourage self-reporting of bribery which sets out in detail how reports should be made and the criteria COPFS will apply when assessing self reported cases. A link to the guidance can be found in Appendix 2.

9.11 Public interest

The MOJ Guidance does not define what is meant by the Public Interest and it has in modern day language become a much used expression without being properly defined. It is also true that with modern day media, electronic communication and the internet, information is much more freely available and as such, much more tends to come into the classification of "Public Interest". What we are seeking to avoid is the issue of "in the Public Interest" becoming confused with the expression in the "interest of the public".

While we will probably have to await case law to get some form of definition, it would be helpful if some greater guidance or clarity was provided in relation to "Public Interest".

We believe that it would be helpful if the MOJ Guidance was expanded so that it was required to have a public interest and a direct public impact. It is easy to make a case for the public being interested – it requires a bit more clarity around the facts to expand the interest into a general public impact.

9.12 Significant investments

There are those people who not only make significant investments, but also take a hands on interest and participation in those investments. This is particularly relevant to the private equity industry where they will have a significant investment and have a number of significant controls and influences over the business.

While it will be necessary to review the individual circumstances as to whether the Act applies, it would be appropriate to assume it does unless your position is only a minority shareholding with no rights of veto and no preferred terms.

In the situation where it is more than just a passive shareholding, you will want to seek to protect yourself through contractual terms and ensuring that the board and management have in place the appropriate processes, procedures and policies as set out in this guidance paper.

9.13 Investment industry/alternative investment industry

Funds and people working in the investment industry will have to consider a number of factors in relation to the Act.

(a) Being a shareholder in an organisation that gets charged under the Act may not result in the fund or person that owns the shares being prosecuted, but it could

have a severe financial and reputational impact. As such institutional investors may want to make corporate procedures, processes and policies, in relation to bribery, a key aspect of their due diligence process.

(b) Institutional investors, through ownership of shares and the exercise of their voting rights, can bring pressure to bear on companies and their boards. This is an area where institutions may wish to review their policies and clearly communicate those policies to the market and the companies in which they invest. Institutional investors globally can and will, over time, have a major influence in creating a level playing field for free trade and the benefits that flow from free trade.

(c) In certain circumstances institutional shareholders can find themselves in a position where they are more than just a minority investor or indeed a passive investor. In these circumstances they will need to carefully consider their position and whether they are moving in a position where the Act is relevant.

(d) As with any legislation there are legal, financial and reputational issues for businesses and as a minimum, investors should consider the impact of the Act on a business just the same way as they consider other risks and opportunities when making or holding an investment.

10 CHECKLISTS – TO HELP ENSURE THAT A BUSINESS HAS PROPORTIONATE PROCEDURES IN PLACE

10.1 Purpose of checklists

The following checklists have been designed to help facilitate a proper assessment of the risks that an organisation faces with respect to the requirements of the Act. The questions presented are not exhaustive and it is suggested that organisations add to those presented to meet their particular circumstances. The checklists are designed to assist management risk officers, boards and audit committees. The ultimate objective is as mentioned earlier, to encourage appropriate dialogue amongst these parties with a view to identifying:

(i) the risks which the organisation faces with respect to the Act; and
(ii) the steps that the organisation can take to mitigate those risks.

The checklists are not designed to ask every question that will be relevant to every business sector but more to provide a high level focus on the principles and issues. They should, if used correctly with the right audience, stimulate further thought, questions and discussion as to what else might be relevant for a particular business, industry or model. They are also not designed as a tick box exercise; if used as part of the audit trail to record due process has been conducted, they should be suitably annotated or have cross references to the appropriate supporting documentation. Where we believe they can be used very effectively is in providing an Audit Committee, Risk Committee or other appropriate Committee, with supporting evidence that proportionate process has been conducted in respect of the Act. This should be a regular process, not a one-off exercise.

10.2 How to use the checklists

The checklists can be used for:

(i) **Risk review** – as a set of questions to aide the risk review process. In particular, business model/nature of business, business sector, and geographic coverage will provide a useful starting point for organisations to identify areas of business risk.

(ii) **Policies, processes and procedures** – the checklists can provide a useful set of questions for management to assist them to formulate their policies, processes and procedures and in undertaking an assessment as to whether they are proportionate.

(iii) **Compliance, internal audit, audit committee and risk committee** – the checklists provide a framework for review work or other actions that require to be undertaken as part of the risk and assurance umbrella.

(iv) **Board and audit committees** – the checklists can provide an efficient and effective means of providing the audit committee or board with assurance that the relevant matters have been considered/reviewed and that a proper process has been conducted upon which reliance can be placed.

(v) **Investors** – the checklists can provide an aide mémoire as to areas where due diligence should be undertaken, comfort should be obtained or formal contractual terms require to be considered as part of the investment process.

(vi) **Prosecutors, defence lawyers and judges** – the checklists and related supporting documents will be part of the process in considering whether proportionate procedures, policies and processes exist to protect an organisation against bribery.

10.3 Business model/nature of business

		Yes	No	Ref material
1	Is the Business Model clearly articulated and understood?	☐	☐	☐
2	Are the key risks to the business model clearly defined?	☐	☐	☐
3	Has the organisation undertaken an appropriate and sufficient risk assessment exercise to identify any areas where the organisation may be at risk of breaching the Bribery Act 2010?	☐	☐	☐
4	Does the business model subject the organisation to significant potential risks in relation to ensuring compliance with the Bribery Act?	☐	☐	☐
5a	Does the organisation operate through agents?	☐	☐	☐
5b	If you answered yes to 5a, are those agents empowered to negotiate contracts?	☐	☐	☐
5c	If you answered yes to either 5a or 5b, has the organisation taken steps to mitigate such risks?	☐	☐	☐
6	Does the organisation have appropriate knowledge of its 'associates' and employees and their respective activities?	☐	☐	☐
7	Are the 'associates' and their employees highly regarded in the market place?	☐	☐	☐
8	Has an appropriate process been gone through to identify a suitable 'associate' for the function they perform/will perform?	☐	☐	☐
9	Does the organisation operate in any sectors where there is a fear that payment of bribes is commonplace or is not considered a very rare occurrence?	☐	☐	☐
10a	Does the organisation outsource any of its functions?	☐	☐	☐
10b	If you answered yes to 10a, is there any increased risk that the organisation might breach the requirements of the Act?	☐	☐	☐
10c	If you answered yes to 10a, is this risk increased by outsourcing functions overseas?	☐	☐	☐
10d	If you answered yes to 10b, has the organisation taken appropriate action to mitigate this increased risk, including that relating to outsourcing functions overseas?	☐	☐	☐
11	Has the organisation given consideration to including appropriate wording on contracts and all communications with suppliers (including sub-contractors) and customers advising/reminding them of the organisation's policy on bribery?	☐	☐	☐
12	Does the organisation have appropriate contracts with agents and a robust method of monitoring their performance/compliance to the terms of the contract?	☐	☐	☐

Provide supporting commentary/evidence where appropriate

10.4 Business sector

		Yes	No	Ref material
1	Is the business sector high risk on a global basis in relation to perceived corruption?	☐	☐	☐
2a	Is the organisation already subject to other regulatory requirements in this area e.g. the US Foreign Corrupt Practices Act?	☐	☐	☐
2b	If so, does the organisation already have existing policies and procedures in place which only need to be tweaked?	☐	☐	☐
3a	Are there specific types of transactions which require additional scrutiny?	☐	☐	☐
3b	If so, has the organisation appropriate controls in place to ensure that such transactions are properly scrutinised before being authorised?	☐	☐	☐
4	Is the use of agents prevalent in this business sector?	☐	☐	☐
5	If the organisation makes use of agents, has it undertaken appropriate due diligence on such individuals?	☐	☐	☐
6	Has the organisation conducted appropriate and sufficient internal and external research in relation to business sector risk?	☐	☐	☐
7	Does the organisation share knowledge with other organisations in the same sector on such matters?	☐	☐	☐

Provide supporting commentary/evidence where appropriate

10.5 Geographical coverage

		Yes	No	Ref material
1	Does the organisation or any connected entities operate in countries other than the UK?	☐	☐	☐
2	Does the organisation operate in or deal with entities in countries which are perceived as having a higher level of public sector corruption, with reference to the Transparency International Corruptions Perceptions Index? www.transparency.org/research/cpi/overview	☐	☐	☐
3	If so, has the organisation undertaken a detailed review of its operations/activities in these jurisdictions with a view to seeking to ensure compliance with the Bribery Act 2010?	☐	☐	☐
4	If the risk is high, has the organisation considered moving its operations/activities to a less corrupt jurisdiction?	☐	☐	☐
5	Does the organisation have local employees in foreign jurisdictions?	☐	☐	☐
6	Have all of the organisation's employees been informed and received appropriate training on the implications of the Act?	☐	☐	☐
7	Has the organisation's policies been translated into the official language of each jurisdiction that it operates in?	☐	☐	☐
8	Does the organisation use overseas agents to help it with its overseas activities?	☐	☐	☐
9	How does the organisation monitor the performance of these agents and their activities in relation to their contractual terms and obligations?	☐	☐	☐
10	Does the organisation use raw materials or source products, goods or services which are imported from overseas via an agent?	☐	☐	☐
11	Does the organisation sell goods or services overseas via an agent?	☐	☐	☐
12	If the organisation is setting up offices overseas, will it use employees from the UK to run the office to minimise the risk of local corruption and possible acts of bribery occurring?	☐	☐	☐
13	Do organisation personnel have to travel overseas at short notice and does this cause issues?	☐	☐	☐
14	Are all overseas cash advances properly supported, authorised and accounted for and are proper invoices/ receipts provided to support expenditure?	☐	☐	☐
15	Does the organisation have to enter into transactions with Government officials in overseas jurisdictions?	☐	☐	☐
16	Does the organisation understand the culture and local practices of local employees and Government officials?	☐	☐	☐

Provide supporting commentary/evidence where appropriate

10.6 Proportionate procedures

		Yes	No	Ref material
1	Are the organisation's policies and procedures appropriate for an organisation of its size?	☐	☐	☐
2	Has the policy on bribery been appropriately communicated to all relevant employees?	☐	☐	☐
3	Has the organisation considered whether appropriate personnel be asked to sign a statement confirming their knowledge of the Act and compliance with its requirements?	☐	☐	☐
4	Where a director/employee is in doubt as to whether an action will breach the requirements of the Act does the company facilitate access to someone who can provide advice, including where necessary legal advice?	☐	☐	☐
5	Has the organisation put in place a whistle blowing policy/mechanism?	☐	☐	☐
6	Does the organisation maintain a record of: (i) hospitality; (ii) gifts received and given; (iii) entertaining provided and received and is it reviewed on a regular basis?	☐	☐	☐
7a	Where a breach of the Act is identified – this should be communicated at the earliest possible opportunity. Is there a clear communication and escalation channel for such issues?	☐	☐	☐
7b	If you answered yes to 7a, has this channel been communicated to all employees and other company representatives?	☐	☐	☐
8	Does the organisation maintain a register of all such incidents?	☐	☐	☐
9	If a member of staff is forced to pay a bribe, does the organisation have a policy in place to ensure that such matters are reported to the appropriate authority?	☐	☐	☐
10	Does the organisation have a policy of reporting potential breaches, or instances where it has refused to pay a bribe, to the relevant UK authority?	☐	☐	☐
11	Has the organisation considered benchmarking its policies and procedures?	☐	☐	☐

Provide supporting commentary/evidence where appropriate

10.7 Top level commitment

		Yes	No	Ref material
1	Has the board ensured that it has all the necessary policies, procedures and systems in place to minimise the risk that the company will breach the requirements of the Act?	☐	☐	☐
2	Does the organisation have an external code of conduct, and if so, how is it communicated to stakeholders i.e. has the organisation made its policies and stance on bribery publicly known and are they available on the company's website?	☐	☐	☐
3	Are there procedures in place for employees within the organisation to follow if a possible act of bribery occurs or is perceived to have occurred?	☐	☐	☐
4a	Is there an internal code of conduct in place in regard to the Bribery Act that covers all board members and employees?	☐	☐	☐
4b	Is compliance with the code mandatory for all personnel?	☐	☐	☐
5	Has the board communicated the requirements of the Bribery Act and the organisation's policies to all of its personnel?	☐	☐	☐
6	Is a risk assessment completed/reviewed on a periodic basis to ensure that all risks facing the organisation are recorded, assessed and addressed on a timely basis?	☐	☐	☐
7	Does the organisation have a policy on gifts, promotional expenditure, hospitality, entertaining, charitable and political donations?	☐	☐	☐
8	Is a member of the board responsible for ensuring that the organisation's obligations under the Act are regularly reviewed and met?	☐	☐	☐
9	Has the organisation put in place appropriate communication and training programmes for its employees?	☐	☐	☐
10	Does the organisation's risk/internal audit functions have responsibility for ensuring that the company's code and policies are adhered to?	☐	☐	☐
11	Has the organisation established its policy on bribery which conforms to the requirements of the Act?	☐	☐	☐
12a	Does the organisation have an intranet?	☐	☐	☐
12b	If yes, is there a separate section that contains all the relevant data that employees would require and do all employees have access to the intranet?	☐	☐	☐

Provide supporting commentary/evidence where appropriate

10.8 Risk assessment

		Yes	No	Ref material
1	Has the organisation undertaken a full risk review of its business in relation to the Bribery Act?	☐	☐	☐
2	Were the appropriate people involved in the process?	☐	☐	☐
3	Has the risk register been reviewed by a senior member of management and the appropriate board committee?	☐	☐	☐
4	Has the review been conducted within the last 12 months, or more recently if a material change in circumstances has occurred?	☐	☐	☐
5a	Are the controls appropriate and proportionate?	☐	☐	☐
5b	Have they been tested to see that they are operating?	☐	☐	☐
6	Has the organisation sought external assistance in conducting the review or sought out relevant data particularly where overseas operations or locations are involved?	☐	☐	☐
7	Has the outcome of the review been communicated to the appropriate managers and persons responsible for overseeing that area of the business or process?	☐	☐	☐
8	Does the organisation have any close links with government officials, either past or present, and, if so, what is their involvement?	☐	☐	☐
9	Does the organisation maintain a conflicts register and do all directors and employees know to declare any conflicts and ensure that any necessary safeguards are built into the process?	☐	☐	☐

Provide supporting commentary/evidence where appropriate

10.9 Due diligence

		Yes	No	Ref material
1	Does the organisation undertake appropriate due diligence when entering into contracts, particularly with overseas entities?	☐	☐	☐
2	Does the organisation undertake appropriate due diligence where it uses an agent or sub-contractor?	☐	☐	☐
3	Does the organisation undertake appropriate due diligence when making/targeting potential acquisitions?	☐	☐	☐
4	Does such due diligence include work on assessing any potential risk in relation to non-compliance with the Bribery Act?	☐	☐	☐
5	Does the organisation have appropriate processes regarding employment, including recruitment, terms, conditions, disciplinary action and remuneration?	☐	☐	☐
6	Are there appropriate governance arrangements in place for all associated persons which cover pre and post contracted employment?	☐	☐	☐

Provide supporting commentary/evidence where appropriate

10.10 Communication and training

		Yes	No	Ref material
1	Does the organisation's policy on the Bribery Act form part of its induction programme for appropriate personnel?	☐	☐	☐
2	Has the organisation created a short video or other training aid to highlight the issues associated with the Act?	☐	☐	☐
3	Does the organisation ensure that all employees and those who do business on the company's behalf, including sub-contractors, are made aware, in writing, of the company's policy on bribery?	☐	☐	☐
4	Does the organisation ensure that where necessary training is provided to those individuals where a risk is perceived that bribes may either be paid or be receivable e.g. for those responsible for vetting suppliers or agents?	☐	☐	☐
5	Is training compulsory, monitored and refreshed as required?	☐	☐	☐
6	What does the organisation do to keep bribery front of mind for all relevant employees?	☐	☐	☐
7	Does the organisation have all the relevant forms, policies, procedures, risk registers and other related papers in regard to the Bribery Act in a single place which can easily be accessed by all employees?	☐	☐	☐
8	Has the organisation considered using case studies or other external material including the ethical case studies in section 11 of this publication, as part of its training process?	☐	☐	☐

Provide supporting commentary/evidence where appropriate

10.11 Monitoring and review

		Yes	No	Ref material
1	Does the organisation have someone, preferably a board member, who is responsible for ensuring compliance with the Act and who undertakes appropriate monitoring and review of identified risks?	☐	☐	☐
2	Does the organisation have a policy of escalation covering any findings which might indicate a threat or breach of the Act?	☐	☐	☐
3	Has the organisation's internal audit function built in the need for compliance checks into its monitoring programmes?	☐	☐	☐
4a	Is the level of authorisation for expenses appropriate and independent?	☐	☐	☐
4b	Is such expenditure closely monitored to ensure that all expenditure is reasonable?	☐	☐	☐
5	Does the organisation have a policy on the receipt of goods at discount prices from suppliers?	☐	☐	☐
6	Does the organisation have the appropriate level of management information and is it reported to the appropriate individual?	☐	☐	☐

Provide supporting commentary/evidence where appropriate

11 CASE STUDIES

11.1 How to use the case studies

The case studies have two practical uses. Firstly, they seek to bring theoretical situations into real life examples. They convert theory into practice for the reader. ICAS has through its website - icas.org.uk/ethics - over 40 ethical case studies available and the most recent of these were published under the heading 'Shades of Grey'. The 'Shades of Grey' publication and the individual case studies can be accessed at: icas.org.uk/ethics.

If a picture is worth 1000 words then the case studies are seeking to create colour and clarity for the reader. They are intended to bring ethics to life!

Secondly, the case studies can be used as a training medium. We have found them very useful and thought provoking when a group of 8-10 people are given time to read and make notes of the salient points of a case study and are then brought together to discuss their views. Normally lively debate ensues and often there are differing views, albeit, over time, a level of consensus is arrived at. It has to be highlighted that debate is healthy and helps to uncover aspects to a particular case study that were not even anticipated by its authors. The observed debate lead us to coin the title of our ethics publication "Shades of Grey". The quality of these case studies has been evidenced by several bodies across the globe seeking permission to reproduce them or indeed translate into the local language.

While findings with regard to offences brought under the Bribery Act are likely to be black or white, one needs to recognise that the real life events could and often will include issues that are not clear cut. The better the audit trail, the rational and the level of discussion/debate the better the probability of a successful defence of any action brought under the Act. We believe the case studies can, used properly, provide a good catalyst for bringing awareness and culture to the front of mind in any organisation.

The case studies featured on the following pages specifically focus on matters related to the implications of the Bribery Act 2010. However, they do however highlight aspects which are not solely related to the Act such as the need for organisations to ensure that a proper tone at the top is set and that this tone is cascaded down through the organisation, regardless of the nature of the business, or where it, or its affiliates, are located.

11.2 Case study 1 – Should you use an agent? - 'Use or lose'

You are the Chief Executive at Mandyhand plc, which is a group of companies operating in the heavy engineering sector with a customer base exclusively in the EU. The ongoing tough economic conditions have led the company to revise its geographical customer base and it is currently seeking to target other markets, particularly to penetrate the increasing potential in the Asian market. A new potential customer for your company's products is based in Corruptal, a country in which you believe there is plenty of scope in the coming years for increasing growth, as when the country becomes more developed, considerable amounts will be spent on capital projects to improve the country's poor infrastructure. You have no great knowledge of this country but news reports indicate that, although its political landscape and business environment have improved in recent years, stories of corruption are still commonplace and it is alleged that obtaining

government approval can be a long and arduous process. Initial enquiries made by your marketing director have revealed that it will be necessary to use the services of a local agent in order to be able to do business in this country.

You are aware that the UK has introduced the Bribery Act 2010. You are therefore somewhat wary of using the services of a local agent but you are well aware that it would appear penetration of this market is essential for the future success of your company.

What do you do now?

CASE STUDY 1: ANALYSIS

What are the readily-identifiable ethical issues for your decision?

For you personally

The need to ensure that your organisation does not commit an offence under the Bribery Act 2010. This will involve ensuring that your organisation has in place appropriate procedures to mitigate the risk that bribery does occur. As the Chief Executive, you will need to ensure that the proper tone at the top of your organisation is set and that this tone is appropriately cascaded down through your organisation. 'Top level commitment', as mentioned in section 6 of this guidance, is one of the key principles recognised by the MOJ. Additionally, paragraph 300.5 of the ICAS Code of Ethics states:

> "A professional accountant in business may hold a senior position within an organisation. The more senior the position, the greater will be the ability and opportunity to influence events, practices and attitudes. A professional accountant in business is expected, therefore, to encourage an ethics-based culture in an employing organisation that emphasises the importance that senior management places on ethical behaviour."

For the company

The need to ensure that the company does not commit an offence under the Bribery Act 2010.

Further research is required to determine definitively whether the use of an agent is required in this country.

The organisation needs to have in place controls which will help to alleviate the risk of it breaching the Act. This will involve the need to properly investigate the business, political, cultural and legal environment in Corruptal to determine the risks associated with doing business in the country from both a normal business perspective and also a Bribery Act perspective. Certain Government agencies may be able to assist you in this process. You should also refer to the Transparency International Corruption index which can be viewed at: www.transparency.org/research/cpi/overview.

The company needs to know exactly what the role of any agent would be and how that person/organisation would be remunerated/rewarded. The company should also communicate to all relevant parties, including any potential agents, its zero tolerance

stance on bribery. It should also ensure that the terms of any contracts with any agents instructed reflect the company's policy on this matter. This policy should also be communicated to all employees, Government officials in Corruptal and potential customers.

Who are the key parties who can influence, or will be affected by, your decision?

You; the company; the other directors; agents in Corruptal; customers; employees; shareholders; the Government of Corruptal; UK Government; and the world at large.

What fundamental ethical principles for accountants are most applicable and is there an apparent conflict between them?

Integrity	The need to ensure that your behaviour does not result in your company seeking to gain a competitive advantage by unethical means. You need to seek to ensure that your company has appropriate controls in place to minimise the risk of your company committing an offence under the Bribery Act 2010. Setting an appropriate 'tone at the top' is absolutely essential in seeking to minimise this risk.
Objectivity	The need to ensure that the potential short-term commercial impact of this decision does not unduly influence the outcome of your decision.
Professional competence and due care	The need to be aware of the requirements of the Bribery Act 2010 and to ensure that these are properly embedded into your organisation. To ensure that your organisation has an appropriate system of internal controls in place to mitigate the risk of the company committing an offence under the Act.
Confidentiality	Assumed.
Professional behaviour	As per integrity and professional competence and due care.

Is there any further information (including legal obligations) or discussion that might be relevant?

The exact role of the agent – what, if anything, will the agent do to help facilitate the local Government's approval?

What, if anything, does the law in Corruptal say in relation to facilitation payments?

Does the company have to use the services of an agent to do business in Corruptal?

Is there a conflict between the 'Guardian' and 'Commercial' strands of an accountant's responsibilities?

Potentially in the short-term, but if a longer-term view is taken then these strands should converge. The long-term sustainability of an organisation depends in part with it not adopting unethical practices or breaching legislative requirements.

Based on the information available, is there scope for an imaginative solution?

No.

Are there any other comments?

Please refer to the guidance published by the Ministry of Justice. This can be viewed at: www.justice.gov.uk/legislation/bribery.

11.3 Case study 2 – Appointing a new agent - 'Facilitate the deal'

You are the Finance Director at Yaja plc, a large UK manufacturing company. Your company has been approached to tender for a contract to supply the Ministry of Finance in Blisepp with IT equipment. You are aware having undertaken some research that in order to do business in Blisepp appears to require the services of a local agent to be involved in the contractual process with local government officials. You make some local enquiries and find out that each of the local agents appears to be requesting amounts in excess of what you would normally associate for performing such activities. You are not sure whether you should go ahead and submit a tender for this potential contract.

What do you do now?

CASE STUDY 2: ANALYSIS

What are the readily-identifiable ethical issues for your decision?

For you personally

The need to properly investigate the exact "role" of the agent i.e. what specifically will the agent be doing on your company's behalf. It would appear that you need to do further research before arriving at a decision e.g. is the higher cost of using the services of an agent in Blisepp reflective of the economy in that country? What is the perceived cultural attitude to bribery within the country? Have you spoken to any other companies who have had dealings within Blisepp or with UK Government officials? Consideration needs to be given to seeking appropriate legal advice either internally within the company, or from an appropriate expert, if you still wish to tender for the contract. If 'facilitation payments' appear to be the norm, what are the legal rules regarding these within Blisepp – i.e. are such payments permitted by the written law of the country? Bribery of Government Officials is a specific offence under the Bribery Act.

For the company

The need to ensure that the company does not breach the requirements of the Bribery Act 2010.

Therefore, the points raised above need to be properly addressed i.e. the company has to have appropriate controls in place to ensure that no agent would be appointed on its behalf without first undertaking sufficient due diligence.

Who are the key parties who can influence, or will be affected by, your decision?

You; the company; the other directors; agents; customers; employees; shareholders; Government of Blisepp; UK Government; and the world at large.

What fundamental ethical principles for accountants are most applicable and is there an apparent conflict between them?

Integrity	The need to ensure that your actions or inactions do not lead to your company breaching the requirements of the Bribery Act.
Objectivity	The need to ensure that the potential commercial impact of this decision does not unduly influence the outcome.
Professional competence and due care	As per integrity.
Confidentiality	Assumed.
Professional behaviour	As per integrity.

Is there any further information (including legal obligations) or discussion that might be relevant?

The exact role of the agent – what will be his role and what specifically does he do to help facilitate the local Government's approval.

Information on the political and economic conditions in Blisepp and also on the local legal, cultural and business practices?

Is there a conflict between the 'Guardian' and 'Commercial' strands of an accountant's responsibilities?

Potentially in the short-term, but if a longer-term view is taken then these strands should converge. The long-term sustainability of an organisation depends in part with it not adopting unethical practices or breaching legislative requirements.

Based on the information available, is there scope for an imaginative solution?

No.

Are there any other comments?

Please refer to the guidance published by the Ministry of Justice. This can be viewed at: www.justice.gov.uk/legislation/bribery.

11.4 Case study 3 – Role of existing agent - 'Don't pay the ferryman?'

You are the Sales and Marketing Director of Leadatheway plc, a company head quartered in the UK which sells high value components to the oil and gas industry. These components are used in the drilling industry and there is a need to have immediate access to spare parts/replacements due to the cost of drilling and any downtime involved.

As the oil and gas industry and drilling operations are by nature global, and diverse, with some in less developed economies, from a political standpoint it is necessary for Leadatheway plc to service the industry through a number of locally appointed agents who are paid a basic retainer and limited expenses but make their real return on sales commission.

One of Leadatheway's local agents in Magnolialand has recently contacted you and informed you that he can sell components at a price in excess of the standard terms, but wants an enhanced commission on that element of the price which exceeds the standard terms.

Being able to earn significantly higher profits on sales to the new emerging fields in Magnolialand, which could be a major area of growth over the next 10 years, appears very attractive. You are well aware that the prospect of increasing turnover will be viewed very positively by your Chief Executive.

However, something is nagging you at the back of your mind – how will the agent be able to sell the components at this new higher price?

Should you question why your agent is able to sell products at a significantly higher price and what he will be doing with all the commission he earns, particularly as he has asked for an advance on his commission in regard to a very large order?

What do you do now?

CASE STUDY 3: ANALYSIS

What are the readily-identifiable ethical issues for your decision?

For you personally

The Bribery Act has introduced new offences of offering or receiving bribes, bribery of foreign public officials and of failure to prevent a bribe being paid on an organisation's behalf. This agent has already been used by your organisation. Your organisation needs to have appropriate vetting procedures in place to assess the suitability of such persons regardless of how long they may have previously worked on behalf of your organisation. Such persons also need to be aware of your company's policy on bribery. Where something appears to be out of the norm this should serve as an immediate red flag as a potential risk. To mitigate this risk you will need to be fully aware of how the agent will be able to generate this additional revenue, and to ensure that if the deal is to go ahead that the additional income will not be generated via use of unethical or unlawful practices, which includes the payment of bribes.

For the company

Has Leadatheway fully identified the implications of the Bribery Act and does it have an appropriate system of controls in place to mitigate the risk that the company might breach the requirements of the Act? Is Leadatheway aware that a new offence was created under section 7 of the Act, whereby an offence can be committed by commercial organisations which fail to prevent persons associated with them from bribing another person on their behalf? A statutory defence was also established by the Act: organisations which have adequate procedures in place to prevent bribery are in a stronger position, if isolated incidents have occurred in spite of their efforts. If an organisation can prove that it has adequate procedures in place to prevent persons associated with it from bribing, then it will have a defence to the section 7 offence.

The Ministry of Justice has published guidance under section 9 of the Act which is designed to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery, as mentioned in section 7. The guidance can be viewed at: www.justice.gov.uk/legislation/bribery.

Whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts, taking into account the particular facts and circumstances of the case. Leadatheway needs to note that the onus remains on it, in any case where it seeks to rely on the defence, to prove that it had adequate procedures in place to prevent bribery. However, a departure from the suggested procedures contained within the MOJ guidance will not of itself give rise to a presumption that an organisation does not have adequate procedures.

Has Leadatheway:

(i) Made its employees and others (including agents) acting on its behalf in relation to bidding for business fully aware of its anti-bribery statement, code of conduct and, where appropriate, that details of its anti-bribery policies are included in any tender document?

(ii) Included suitable contractual terms on bribery prevention measures in the agreement between itself and the agent, for example: requiring the agent not to offer or pay bribes; giving Leadatheway the ability to audit the agent's activities and expenditure; requiring the agent to report any requests for bribes by officials to Leadatheway; and, in the event of suspicion arising as to the agent's activities, giving Leadatheway the right to terminate the arrangement?

(iii) Made its employees fully aware of policies and procedures applying to relevant issues such as hospitality and facilitation payments, including all financial control mechanisms, sanctions for any breaches of the rules and instructions on how to report any suspicious conduct? Supplementing the information, where appropriate, with specially prepared training to Leadatheway's staff involved with doing business in Magnolialand.

Who are the key parties who can influence, or will be affected by, your decision?

You; the other directors; the shareholders; the agent; the employees; shareholders; customers; suppliers; the respective governments; and the world at large.

What fundamental ethical principles for accountants are most applicable and is there an apparent conflict between them?

Integrity	You need to fully satisfy yourself as to how the "intermediary" will be able to sell your products in excess of the standard terms. Once you are aware of the facts you can then make an assessment as to whether there is likely to be a breach of the Bribery Act 2010.
Objectivity	Assumed, however, you need to ensure that your opinion on this matter is not unduly influenced if you have dealt with this particular agent for a long period of time and have a good working relationship with him.
Professional competence and due care	As per integrity – you need to show appropriate professional competence and due care to fully get to the bottom of how the agent will be able to sell your company's products in excess of the standard terms and then, once appraised of the facts, make a judgement with regards to the requirements of the Bribery Act.
Confidentiality	Assumed.
Professional behaviour	To ensure that all board members are aware of all of the facts before a decision is made on this matter.

Is there any further information (including legal obligations) or discussion that might be relevant?

Information on how the agent will be able to sell these products for an amount in excess of the standard terms.

Is this the only country where the company uses "agents" of this nature?

Information on the political and economic conditions in Magnolialand and also on the local legal, cultural and business practices?

Is there a conflict between the 'Guardian' and 'Commercial' strands of an accountant's responsibilities?

Potentially in the short-term, but if a longer-term view is taken, then these strands should converge. The long-term sustainability of an organisation depends in part with it not adopting unethical practices or breaching legislative requirements.

Based on the information available, is there scope for an imaginative solution?

No.

Are there any other comments?

Does your company have appropriate controls in place? Ensure that you have undertaken an appropriate risk assessment exercise. Also refer to the guidance published by the Ministry of Justice to make an appropriate assessment.

11.5 Case study 4: Risk assessment process - 'The world is your oyster'

You are the Finance Director of Helmel plc, a company head quartered in the UK which makes precision mechanical components which up till now have all been sold in the EU. As part of the company's strategic plan to grow its operations overseas it is now planning to sell in one of several emerging markets, all of which appear to offer comparable opportunities. These mechanical components are used in the agricultural sector. Currently, the company has no knowledge in relation to undertaking activities in developing countries and is unsure how to go about assessing the risks of entering a new market.

It is your responsibility for ensuring that the company properly assesses the risks of entering potential new markets.

What do you do now?

CASE STUDY 4: ANALYSIS

What are the readily-identifiable ethical issues for your decision?

For you personally

The checklists in chapter 10 of this guidance provide a good starting point for assessing the likely risks. Additionally, you should consider any, or a combination, of the following:

- Engaging a specialist consultancy or research firm to assist in the process of identifying the most suitable market for expanding your company's activities. This will obviously require consideration of far more than just a review of the likely bribery risks.
- Consulting with UK diplomatic services and government organisations to get more information on each of the potential geographic markets to help inform your decision making process.
- Contacting bodies within these specific markets such as local chambers of commerce, relevant non-governmental organisations and sectoral organisations to help build a better picture as to the market that should be targeted.

Section 330 of the ICAS Code of Ethics deals with 'Acting with Sufficient Expertise'. It is essential that, as a professional accountant within this business, you ensure that you either gain, or seek someone with, sufficient knowledge of the markets which you wish to enter, to allow you to undertake a proper risk assessment.

You should engage with both the board and senior management in completing the risk assessment to ensure that both internal, as well as external risks, to the company are considered.

For the company

The company needs to have appropriate controls in place to ensure that any risks of bribery are properly assessed. Your organisation will need to properly assess the risks relating to bribery in each of the potential target markets. The checklists provided in section 10 of this guidance provide a useful starting point for undertaking such a risk assessment process.

The company needs to recognise that when expanding operations in the emerging markets, it will be faced with different cultural, legal and business practises which it will have to assess and consider. These considerations should be included within the risk assessment. The company must remember that a good risk assessment considers the wider picture as well, thus risks which haven't so far been identified by the company can be the biggest and most catastrophic. The company should consider engaging a specialist consultancy or research firm to assist in the process of identifying the most suitable market for expanding its activities. Ideally they should have some experience of each of the emerging markets that the company is considering entering. They may have local contacts within each of these markets who can assist with the completion of the risk assessment. The company could also set up a task force, including the expert, to complete a comprehensive risk assessment with the findings being reported to the board for consideration. The company would then be able to take an informed decision, having obtained the relevant information as to which market is best to enter, if any.

The six principles of the MOJ's Bribery Act guidance follow a risk based approach to managing bribery risks. The company should consider the content of that guidance, as it is seeking to enter an emerging market and business cultures and methods of doing business can be very different from the UK. The MOJ guidance also highlights five "commonly encountered risks" which should be incorporated within the risk assessment completed by the company. These are:

- country risk;
- sectoral risk;
- transaction risk;
- business opportunity risk; and
- business partnership risk.

The company should remember that the risk assessment will not be capable of identifying all areas of possible bribery, however, the assessment will mitigate the threat faced by the company, as the risk of bribery, specifically in relation to the company, will have been considered.

Who are the key parties who can influence, or will be affected by, your decision?

You; the other directors; the shareholders; the employees; customers; suppliers; the respective governments; and the world at large.

What fundamental ethical principles for accountants are most applicable and is there an apparent conflict between them?

Integrity	You need to ensure that your company undertakes an appropriate bribery risk assessment for each of the potential markets which it is currently considering. You also need to assess the extent to which the services of experts will be required in this process to ensure that your company has properly considered the particular risks.
Objectivity	Assumed, however, you need to bear in mind that the optimum solution may be to decide to not enter any of these potential markets.
Professional competence and due care	As per integrity – you need to show appropriate professional competence and due care to satisfy yourself that the company is not going to be breaking the law should it begin trading within any of these emerging markets. The risk assessment should be carried out by a competent person knowledgeable of the company, supported by persons with knowledge of the markets in which the company is considering selling its products.
Confidentiality	Assumed.
Professional behaviour	As per integrity. To ensure that appropriate due diligence on the potential target markets is performed and that you consider all of the facts before a decision is made on this matter.

Is there any further information (including legal obligations) or discussion that might be relevant?

A detailed knowledge of the legal, political, cultural and economic environments of the various countries in which the company is considering selling its products.

Whether the company will be or indeed would be required to use the services of local based agents?

Is there a conflict between the 'Guardian' and 'Commercial' strands of an accountant's responsibilities?

Potentially in the short-term, but if a longer-term view is taken, then these strands should converge. The long-term sustainability of an organisation depends in part with it not adopting unethical practices or breaching legislative requirements.

Based on the information available, is there scope for an imaginative solution?

No.

Are there any other comments?

Does your company have appropriate controls in place? Refer to the guidance published by the Ministry of Justice to make an appropriate assessment.

Does the company have a policy that requires risk to be reviewed on an ongoing basis? If it does not have such a policy, then it should consider introducing one in early course to seek to minimise the company's potential exposure.

11.6 Case study 5 – The Grand Prix

You are the Finance Director in Wearemegarich plc, a company which has been performing solidly in the past year and appears to have ridden out the financial crisis. The company's Chief Executive has just informed you that this year he is planning to take a small select band of UK based customers to the Monaco grand prix. He believes this will provide an excellent opportunity to maintain the company's strong relationship with specific key clients and, in particular, with the individuals responsible for ordering the components which your company manufactures. You had replied that it would be cheaper and easier logistically for the company to offer hospitality at the grand prix at Silverstone and that great care would need to be taken with the implications of the Bribery Act. The Chief Executive had replied that:

"I like your attitude to saving costs but Monaco has that certain "je ne sais quoi" factor which is not associated with any other grand prix on the annual circuit. I reassure you that this will be money well spent."

What do you do now?

CASE STUDY 5: ANALYSIS

What are the readily-identifiable ethical issues for your decision?

For you personally

The need to consider the implications of the Bribery Act 2010 on this proposed expenditure.

There is a need to seek appropriate legal advice on this matter. This may in the first instance be with your company's own in-house lawyer (if applicable) or with an external expert in this area. As the Act is still in its infancy and more importantly no substantive case law has developed, there will be a need to ensure that proper legal advice has been sought in advance of committing the company to such hospitality.

For the company

The Bribery Act has introduced new offences of offering or receiving bribes, bribery of foreign public officials and of failure to prevent a bribe being paid on an organisation's behalf.

It is not intended that the Act will prevent businesses offering genuine hospitality that is considered reasonable and proportionate. Therefore, the company can continue to provide hospitality which is bona fide.

The risk in this example is whether a trip for UK based suppliers to attend the grand prix in Monaco would be considered to meet the 'reasonable and proportionate test'. Ultimately, it will be down to the Courts to decide exactly how this phrase is interpreted.

Has Wearemegarich plc fully identified the implications of the Bribery Act and does it have an appropriate system of controls in place to mitigate the risk that the company might breach the requirements of the Act. The Ministry of Justice has published guidance under section 9 of the Act, which is designed to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery. The guidance can be viewed at: www.justice.gov.uk/legislation/bribery.

Who are the key parties who can influence, or will be affected by, your decision?

You; the CE and other directors; the shareholders; the employees; and customers.

What fundamental ethical principles for accountants are most applicable and is there an apparent conflict between them?

Integrity	You need to satisfy yourself that the company is not going to be in breach of the requirements of the Bribery Act 2010.
Objectivity	Assumed, however, you need to ensure that you do not feel unduly pressurised by the CE.
Professional competence and due care	As per integrity – you need to show appropriate professional competence and due care to satisfy yourself that the company is not going to be breaking the law with regards to its proposed hospitality.
Confidentiality	Assumed.
Professional behaviour	To ensure that you are cognisant of all of the facts before a decision is made on this matter.

Is there any further information (including legal obligations) or discussion that might be relevant?

Does the company have a policy on the giving and taking of hospitality? If it does not have such a policy, then it should consider introducing one.

Is the company funding all of the expenses, including travel and accommodation, or merely entry to the grand prix?

Is this proposed hospitality in line with that offered by competitors in your industry?

Is there a conflict between the 'Guardian' and 'Commercial' strands of an accountant's responsibilities?

Potentially there is. The company may at first hand seen to be better off by taking the customers to the Monaco grand prix, if it were directly to lead to at least retaining the current level of business from these specific customers. However, if the company was to be found to have been in breach of the Bribery Act 2010 (there is currently no evidence to suggest that it would) then the negative publicity might have longer-term damaging consequences.

Based on the information available, is there scope for an imaginative solution?

Consideration could be given to taking the customers to another major sporting event in the UK.

Are there any other comments?

None.

APPENDIX 1 - DEFINITIONS

Act	The Bribery Act 2010 (For link see Appendix 2)
Associated person	A person who 'performs services' for, or on behalf of, the organisation. This person can be an individual or an incorporated or unincorporated body.
Business opportunity risk	Such risks might arise in high value projects or with projects involving many contractors or intermediaries; or with projects which are not apparently undertaken at market prices, or which do not have a clear legitimate objective.
Business partnership risk	Certain relationships may involve higher risk, for example, the use of intermediaries in transactions with foreign public officials; consortia or joint venture partners; and relationships with politically exposed persons where the proposed business relationship involves, or is linked to, a prominent public official.
Country risk	This is evidenced by perceived high levels of corruption, an absence of effectively implemented anti-bribery legislation and a failure of the foreign government, media, local business community and civil society effectively to promote transparent procurement and investment policies.
Penalties	1. An individual guilty of an offence under section 1, 2 or 6 of the Act is liable: (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both. (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both. 2. Any other person guilty of an offence under section 1, 2 or 6 is liable: (a) on summary conviction, to a fine not exceeding the statutory maximum. (b) on conviction on indictment, to a fine. 3. A person guilty of an offence under section 7 is liable on conviction on indictment to a fine. 4. The reference in subsection 1 (a) to 12 months is to be read: (a) in its application to England and Wales in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003, and (b) in its application to Northern Ireland, as a reference to 6 months.

APPENDIX 1 - DEFINITIONS (Cont)

Act	The Bribery Act 2010 (For link see Appendix 2)
Relevant commercial organisation	As a body or partnership incorporated or formed in the UK, irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation.
Sectoral risk	Some sectors are higher risk than others. Higher risk sectors include the extractive industries and the large scale infrastructure sector.
Transaction risk	Certain types of transaction give rise to higher risks, for example, charitable or political contributions, licences and permits, and transactions relating to public procurement.

The above definitions are commercial definitions and interested parties should refer back to the Act if they are seeking the legal definition as set out in the Act.

APPENDIX 2 OTHER USEFUL SOURCES OF INFORMATION

Approach of the Serious Fraud Office to dealing with overseas corruption	http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/bribery-act-prosecution-guidance-published.aspx
The Bribery Act 2010 (actual legislation)	http://www.legislation.gov.uk/ukpga/2010/23/introduction
The Crown Office and Procurator Fiscal Service guidance	http://www.crownoffice.gov.uk/Publications/2011/07/Guidance-approach-Crown-Office-and-Procurator-Fiscal-Service-Reporting-Businesses-Bribery-Offences
Ministry of Justice guidance	http://www.justice.gov.uk/legislation/bribery
Ministry of Justice quick start guide	http://www.justice.gov.uk/legislation/bribery
Transparency International Corruption index	http://www.transparency.org/whatwedo/pub/corruption_perceptions_index_2011

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