
# 2010 UK Bribery Act

## *A Briefing for NGOs*

***June 2010***

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### 1. Introduction

On April 8th 2010, a new Bribery Act received Royal Assent – one of the last bills to pass into law before the general election. The Act is expected to come into force during 2010, with the date due to be decided by the new Government.

The Bribery Act is one of the toughest anti-bribery laws in the world, with several provisions that go further than the US Foreign Corrupt Practices Act (FCPA). It has significant implications for organisations – including companies and non-governmental organisations[1] (NGOs) – operating or based in the UK. Although primarily aimed at preventing UK companies from paying bribes in the UK and overseas, it also extends to NGOs.

This briefing note presents an overview of the new law and its implications for NGOs, especially those operating overseas in environments where corruption risks are high.

Transparency International UK is working on producing more detailed guidance for NGOs on the Bribery Act. We are also working with Management Accounting for NGOs (Mango) to develop an anti-corruption training course. For further information please contact robert.barrington@transparency.org.uk.

### 2. Summary of the new law

For the full text of the Bribery Act, download the pdf at:
http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100023_en.pdf

- The Bribery Act replaces old and fragmented legislation with a modern and consolidated bribery law, based on the recommendations of the Law Commission
- The Act creates offences of offering, promising or giving of a bribe and requesting, agreeing to receive or accepting of a bribe either in the UK or abroad, in the public or private sectors
- The Act creates a discrete offence of bribery of a foreign public official in order to obtain or retain business
- The Act creates a new offence in relation to commercial organisations which fail to prevent a bribe being paid by those who perform services for or on behalf of the organisation. It will, however, be a defence if an organisation has adequate procedures in place to prevent bribery.

[1] In this note, we use the term NGO to include charities and similar bodies.

## 3. Bribery Act: key areas to note

**3.1 Any act of bribery by a UK organisation or nationals, anywhere in the world, breaks the law in the UK** – this is the case irrespective of the size of the bribe (eg a 'facilitation payment' of $20 to pass through customs). The Act has wide extra-territorial jurisdiction. For example, even if the organisation is not incorporated or based in the UK, it is subject to the new law if it conducts a part of its business in or has close connections with the UK.

**3.2 If the bribe is paid by someone else on your behalf, you are still guilty.** The Act prohibits all corrupt payments, regardless of whether they are paid directly by the organisation, or on its behalf by a third party. They organization can also be guilty of a failure to prevent bribery offences if an "associated person" carries out an act of bribery on its behalf. The Act defines an "associated person" as one who performs services on behalf of the principal. This may apply to the actions of an agent, a distributor, sub-contractor or joint venture partner. What this means is that where an organisation has operations carried out by another individual or entity on its behalf, even in small part, particularly in difficult jurisdictions, it is important to ensure that the third party is aware of and commits itself to the anti-bribery policies of the principal, that it is made aware of a zero tolerance culture within the organisation, and that it is subject to appropriate due diligence and monitoring.

**3.3 The organisation is liable as well as the employee or business partner who paid the bribe**
The Act *(Section 7)* creates a new strict liability offence for 'commercial organisations' that fail to prevent bribery. The definition of a commercial organisation is "a body [or partnership] which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere)…and, for the purposes of this section, a trade or profession is a business." This will certainly encompass some NGOs, but the precise application of this section of the Act to an NGO may depend on how the organisation is constituted and what activities it undertakes. However, it is important to note that even if this affords some protection to the organisation, individual employees or partners who pay bribes on behalf of the organisation will still be personally liable.

**3.4 The 'adequate procedures' defence**
The defence for an organization whose employees or business partners have paid a bribe is that the organisation had put in place "adequate procedures" designed to stop incidences of bribery. The meaning of "adequate procedures" is not defined in the Act. The Secretary of State is required to provide formal guidance on the extent and meaning of "adequate procedures". However, this will not be prescriptive, and will not set out a fail-safe check list of requirements. There is likely to be a focus on the "culture" of an organisation, and it will be expected that there is a "tone from the top" of zero tolerance to bribery and corruption, which is adopted at all levels within the organisation.

**3.5 Trustees, directors and senior managers also have personal liability**
The Act also penalises those senior officers of the organisation with whose "consent or connivance" the bribery was committed (although where the bribery takes place overseas, they must have a "close connection with the UK"). An offence could be committed by the passive acquiescence of a director, if in practice that amounted to consent to the bribery. In addition, failure to maintain "adequate procedures" could render directors vulnerable to civil claims.

**3.6 There are stiff penalties**. Organisations face unlimited fines; individuals – whether bribe payers or directors who 'consent or connive' – face up to ten years' imprisonment, or an unlimited fine, or both. NGOs need 'adequate procedures' to protect against corporate and trustee liability.

**3.7 What is a bribe?** All payments of bribes, no matter how small or routine, or expected by local customs, are illegal. You are breaking the law whether you give or receive a bribe. Unlike some anti-bribery laws, the Bribery Act applies to bribes paid both to public officials and within non-public operations. A bribery offence is committed if the intention of the briber is that the person being bribed improperly performs his/her duties. Improper performance will arise if it is intended that, by paying the bribe, the recipient of the bribe would be expected to act otherwise than in good faith, an impartial manner or in accordance with a position of trust. Expectations are judged by UK, not local, standards.

## 4. Impact of the Bribery Act on NGOs

- Many UK NGOs are often operating in high-risk areas. These are both geographical areas in which there is weak governance [for more information, see the Corruption Perceptions Index at: http://transparency.org/policy_research/surveys_indices/cpi/2009], and in high-risk activities such as interacting with public officials or using local agents and partners. It is therefore possible that many NGOs and charities that operate overseas will be exposed to high risks. To mitigate this risk, organisations will need to ensure they have 'adequate procedures' to prevent bribe-paying. Otherwise, the organisation will put its employees, senior managers, directors and itself at risk. To date, prosecutors have focussed on foreign bribery by companies. However, it is important for NGOs to be aware that if they pay bribes they will contravene the law and are therefore at risk of prosecution.

- The new government's focus on aid effectiveness and transparency is likely to increase scrutiny of how NGOs operate when in receipt of public funds. An increase in the auditing of aid and development expenditure may reveal evidence of bribe-paying.

- The reputational impacts of a bribery scandal should be a significant concern. For example, if a charity's funds are seen to be spent paying bribes, this may deter members of the public and others from making future donations.

- An additional risk to being subject to a bribery prosecution itself, is that an NGO or charity could be caught up in an investigation into a company, which may then lead to a reputational or prosecution risk. For example, if an NGO receives money as part of a corrupt oil deal to build a school in West Africa, and the company that has paid a bribe is prosecuted under the Bribery Act, there may be a reputational impact for the NGO. Likewise, if both a company and an NGO are sub-contractors in a larger project and the company is investigated for bribe-paying, the investigation may be broadened to encompass the activities of the NGO.

- Public funding may be at risk. Under UK procurement law (pursuant to the 2004 EU Public Procurement Directive) an NGO convicted of a bribery offence is debarred from participating in future public contracts. This could have a significant effect on organisations that receive public funds, for example DFID or EU funding. Although this has not been tested in practice, it is a serious potential risk that should not be discounted or under-estimated.

- Trustees, particularly those with a private sector background, are likely to become increasingly aware of the organisational and personal risks created by the Bribery Act, and may wish to see rapid action in reducing the risks.

## 5. How good are NGO and charity anti-bribery procedures?

- Research by Transparency International UK suggests that among NGOs anti-bribery procedures are either poor or non-existent. They certainly would not constitute 'adequate procedures' under the Bribery Act.

- This is often explained by the difficult circumstances in which NGOs are operating on the ground, with paying a bribe seen as the only way to get things done or the lesser of two evils in mission-critical situations.

- However, this exposes organisations, their employees and their trustees to liability under the Bribery Act.

## 6. What should you be doing?

1. **Conduct a risk assessment**: where is your organisation exposed to a high risk of bribery – and how effective are its anti-corruption policy and management systems?

2. **Introduce a zero-tolerance policy**: put in place a headline policy that notes the damage that corruption does to your goals and mission, the importance of strong internal anti-bribery systems and makes it clear that the organisation does not tolerate bribery in any form. Anything less will provide a weak defence under the Bribery Act.

3. **Information gathering**: it is important to know whether bribes are being paid by your employees, agents or partners – and if so where, how much, and how frequently. This information is crucial if the organisation is to implement a zero-tolerance policy and, where necessary, try and 'design out' bribery from future projects or operations. Paradoxically, creating such a paper trail may provide evidence in a prosecution. However, such information gathering would probably be regarded as part of an 'adequate procedure', and therefore failure to assess the extent of bribery in an organisation might create a liability for senior managers and directors who could be accused of 'consent and connivance' by turning a blind eye.

4. **Put in place robust anti-bribery systems:** having in place 'Adequate Procedures' is the only defence to protect an organisation against corporate liability under the Bribery Act TI produces a 20-point checklist for companies to assess anti-corruption procedures, which is annexed to this briefing note. Although it is aimed at companies, it is also relevant to NGOs. TI is seeking funding to develop NGO-specific tools.

5. **Training and support**: implementing effective anti-bribery systems can be a difficult process, and employees and partners may feel vulnerable and ill-equipped, especially in a transition phase from one way of doing things to another. Proper training and support is a vital part of this process.

## 7. Where can you get help?

- Transparency International has experts able to assist NGOs in developing robust anti-bribery systems. Details are available from robert.barrington@transparency.org.uk.

- Mango is working with Transparency International UK to develop an anti-corruption training course with specific reference to the Bribery Act.

- A large number of advisors, including law firms, accountants and consultants, are starting to offer services in the area of adequate procedures.

- Do it yourself: annexed to this note are six scenarios to illustrate situations in which NGOs might encounter bribery or risk contravening the Bribery Act. Transparency International publishes a selection of tools for risk assessment and designing robust systems that are likely to be regarded as 'adequate procedures' under the Bribery Act. They are available at www.transparency.org. These are aimed at the private sector, and we are now seeking funding to develop tools specifically for the NGO sector that will be relevant to the Bribery Act.

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# Annex 1: Anti-Bribery & Corruption 20-point checklist

*Nb this has been developed for use by the private sector and should be considered solely as a reference document pending the development of NGO-specific tools*

| POLICY | | | Yes | No | Partly | Planned |
|---|---|---|---|---|---|---|
| 1 | Is there a formal up-to-date published policy of zero tolerance of bribery? | | ☐ | ☐ | ☐ | ☐ |
| 2 | Is there a public commitment to be consistent with all relevant anti-bribery laws in all the jurisdictions in which your company operates? | | ☐ | ☐ | ☐ | ☐ |
| 3 | Have you made a commitment to implement an anti-bribery Programme[2]? | | ☐ | ☐ | ☐ | ☐ |

| IMPLEMENTATION | | | Yes | No | Partly | Planned | N/A |
|---|---|---|---|---|---|---|---|
| 4 | Do you carry out regular risk assessment to determine the risks of bribery and tailor the Programme to mitigate these risks? | | ☐ | ☐ | ☐ | ☐ | |
| 5 | Does your Programme have detailed policies, procedures and controls for: | political contributions? | ☐ | ☐ | ☐ | ☐ | ☐ |
| | | charitable donations and sponsorships? | ☐ | ☐ | ☐ | ☐ | ☐ |
| | | facilitation payments? | ☐ | ☐ | ☐ | ☐ | |
| | | gifts, hospitality and travel expenses? | ☐ | ☐ | ☐ | ☐ | |
| 6 | Does your leadership[3] show active commitment to the Programme and act as an example for transparency and integrity? | | ☐ | ☐ | ☐ | ☐ | |
| 7 | Does your leadership assign unambiguous responsibility and authority to managers for carrying out the Programme? | | ☐ | ☐ | ☐ | ☐ | |
| 8 | Is the Programme implemented in all business entities over which your company has effective control? | | ☐ | ☐ | ☐ | ☐ | ☐ |
| 9 | Do you encourage an equivalent Programme in business entities in which your company has a significant investment or with which it has significant business relationships? | | ☐ | ☐ | ☐ | ☐ | ☐ |
| 10 | Is the Programme communicated to: | all employees? | ☐ | ☐ | ☐ | ☐ | |
| | | business partners? | ☐ | ☐ | ☐ | ☐ | |
| | | other stakeholders? | ☐ | ☐ | ☐ | ☐ | |
| 11 | Do your human resources practices[4] reflect your company's commitment to the Programme? | | ☐ | ☐ | ☐ | ☐ | |
| 12 | Is tailored training provided to: | all Directors, managers, employees and agents? | ☐ | ☐ | ☐ | ☐ | |
| | | key high risk third parties including other intermediaries, contractors and suppliers? | ☐ | ☐ | ☐ | ☐ | |
| 13 | Does your company provide secure and accessible channels through which employees and others can obtain advice or raise concerns ('whistleblowing") without risk of reprisal? | | ☐ | ☐ | ☐ | ☐ | |
| 14 | Are there internal controls to counter bribery comprising financial and organisational checks over accounting and record keeping practices and related business processes? | | ☐ | ☐ | ☐ | ☐ | |

| MONITORING AND REVIEW | | Yes | No | Partly | Planned |
|---|---|---|---|---|---|
| 15 | Are the internal control systems, in particular the accounting and record keeping practices, subjected to regular review and audit? | ☐ | ☐ | ☐ | ☐ |
| 16 | Do you have procedures in place to deal with any incidents of bribery? | ☐ | ☐ | ☐ | ☐ |
| 17 | Do your senior management periodically review the Programme's suitability and effectiveness and implement improvements? | ☐ | ☐ | ☐ | ☐ |
| 18 | Does the Audit Committee, Board or equivalent body make a regular independent assessment of the adequacy of the Programme? | ☐ | ☐ | ☐ | ☐ |
| 19 | Does your company publicly disclose information about its programme and its implementation? | ☐ | ☐ | ☐ | ☐ |
| 20 | Do you carry out external assurance of the Programme and is the opinion statement published publicly? | ☐ | ☐ | ☐ | ☐ |

[2] The whole of an enterprise's anti-bribery efforts including values, code of conduct, detailed policies and procedures, risk management, internal and external communication, training and guidance, internal controls, oversight, monitoring and assurance.
[3] Owner, Board or equivalent body, chair and/or chief executive
[4] Including those for recruitment, training, performance evaluation, remuneration, recognition and promotion

# Annex II: Corruption Scenarios for NGOs

***Scenario 1***
A major natural disaster has happened in a country where corruption is a huge problem. Emergency supplies that could save thousands of lives are being blocked by customs officials and the army. The army offers to provide 'security' for transporting the supplies for a significant payment, and the customs officials require that 'official transport' must be used and 'emergency clearance permits' must be obtained, likewise for a significant payment. A decision must be made within 24 hours to prevent large loss of life. You are the management team making this decision.

- How would the Bribery Act apply to this situation?
- What would you do?

***Scenario 2***
A government receives $300 million of funding for specific MDG (Millennium Development Goals) priorities in-country; the projects on the ground receive less than 10% of the funding. NGOs are part of the delivery mechanism and can use the 10% effectively, but have been told informally by a senior government official that there is a missing 90%. You are the senior management team of an in-country NGO that is a participant in the project and recipient of some of the funding.

- How would the Bribery Act apply to this situation?
- What would you do?

***Scenario 3***
An NGO worker regularly needs to pass a border checkpoint; by paying $25 to the officials there is a 'fast track' process. The money is regularly paid. You are the worker's manager:

- How would the Bribery Act apply to this situation?
- What would you do?

***Scenario 4***
An NGO wishes to obtain a licence to operate in a country which should cost around $200. The licence is continually blocked by an official who first asks for an extension to be built to an orphanage, which turns out to be his own house, and then demands a payment of $10,000. The NGO feels time pressure from donors to start the project and the local manager wants to pay the bribe. You are the UK-based management team of the NGO.

- How would the Bribery Act apply to this situation?
- What would you do?

***Scenario 5***
A donor has a long-term commitment to a regional community-based agricultural and forestry project. Part of the project involves a series of workshops for central and regional government officials, whose support is crucial for the project to proceed. Officials regularly fail to turn up for workshops but are provided with per diems and travel expenses. You are the management team of the local NGO managing the project.

- How would the Bribery Act apply to this situation?
- What would you do?

***Scenario 6***
A UK development NGO finds an NGO partner in-country that has excellent political connections and is highly effective at getting the job done. However, the UK NGO discovers that the politicians who set up the local NGO are also using it as a mechanism for raising donor funds that are channelled into their private bank accounts. You are the UK-based manager to whom this is reported by your local staff.

- How would the Bribery Act apply to this situation?
- What would you do?