



THE CHURCH OF SCOTLAND LAW DEPARTMENT

CIRCULAR ON THE BRIBERY ACT 2010 TO ASSIST PRESBYTERIES AND CONGREGATIONS

Introduction

The Act comes into force on 1st July 2011. This paper highlights some aspects of the Act and its implications for Church of Scotland bodies.

Background and summary of provisions

It has been claimed that bribery is the fastest growing economic crime in the UK. In response, the Bribery Act received Royal Assent on 8th April 2010. And, whilst the Act may seem revolutionary, bribery has always been illegal in the UK. What is new, however, is that the UK anti-bribery laws are now consolidated and, as a result of new offences which have been included, the UK will now have some of the most stringent anti-bribery laws in the world. The Act is not particularly well drafted but is a significant and important piece of legislation with implications and repercussions for most organisations in the UK.

The offences under the new Act

- **Active Bribery:** Offering, promising or giving a financial or other advantage;
- **Passive Bribery:** Requesting, agreeing to receive or accepting an advantage;
- **Bribing a foreign official**
- **A Strict liability corporate offence for 'commercial organisations':** A corporate is guilty of an offence if an 'associated person' bribes another person.

These offences are widely drafted and have attracted criticism in this respect. As a result, it is generally agreed that the first two offences need to be interpreted against the criteria of 'intention', i.e. where the act is done with the intention of bringing about improper performance or where it is known or believed that the advantage offered is itself improper performance.

The offence of bribing a foreign official requires an intention to do so in their official capacity or an intention to obtain/retain a business advantage. Guidance under the Act reaffirms that facilitation payments (payments to secure or accelerate the performance of routine or necessary action) are also illegal.

The strict liability corporate offence is different as the intention element does not apply. As a result, any person connected to a commercial organisation who performs services for that organisation could, by their

actions, cause the corporate to be found guilty of the offence. The Church and its statutory corporations are not “commercial” in the strict legal sense.

So where does this leave the Church?

Whilst not a commercial organisation, given the nature, structure and the position occupied by the Church of Scotland in Scotland, it is not unforeseeable that some of the provisions contained within the Act could in the future be extended to apply to the Church. Furthermore, the Act operates worldwide. Any work carried out in another country has to be compliant in that country. There is clearly a need not just to be seen to be compliant with the terms of the Act, but to take on board actively its provisions. Not to do so could put the Church, its employees, office holders and volunteers at risk of penalties which can include unlimited fines, imprisonment of up to 10 years or both. There are limited defences to a charge of bribery. Although not applicable to the Church at present the defence for the strict liability offence would be a demonstration that ‘adequate procedures’ are in place.

The Way Forward - The Adoption of Adequate Procedures

Given the concerns highlighted above, it would be good practice for the Church to have “adequate procedures” in place to prevent acts of bribery.

We recommend that the next steps which should be taken are as follows:

1. There should be an immediate review of the current systems in place to prevent bribery together with the issue of a new Code of Conduct to prevent bribery. Policies and procedures require to be established and in place to implement the Code of Conduct. The definition of bribery must include all the offences in the 2010 Act. This can be done at Central, Presbytery and Congregational level.
2. A policy of zero tolerance to bribery should be approved at every level of the Church, i.e. Council of Assembly, Councils and Committees, Presbyteries and Congregations, and indeed an anti-bribery programme should be agreed. This culture change is necessary from the top down. Therefore, at a Central level the Secretary of the Council of Assembly should be responsible for ensuring that the programme is implemented consistently throughout the organisation, with a clear line of authority, the Presbytery Clerk at Presbytery Level and Clerk to the Board/Session Clerk at Congregational level. Office bearers must not merely sign up to the policy, but must also communicate and actively adhere to and enforce the policy.

Those in position of authority within the Church must therefore be seen at all times to demonstrate clear and active commitment to the

programme and its implementation. Procedures need to be agreed for dealing with breaches. It would be seen to be good practice if anti-bribery was a standing item on Agenda perhaps bracketed with Declarations of Interest at the start of the Agenda. In addition, there should be a written policy prohibiting facilitation payments. Agents and intermediaries need to be aware of this policy as well as employees. Finally, there should be a written policy covering gifts, hospitality and expenses, taking into account the risks of these being used as subterfuge for bribery.

3. It is important that the Church ensures there is a culture of compliance. The Church will have to ensure there is adequate training to enable staff and volunteers to recognise instances of bribery (payments of money and benefits in kind). The existence of a policy is simply not sufficient. There needs to be education on the policy. Areas of risk should be identified and training can be proportionate to risk. Both employees and volunteers must have clear guidelines to enable them to handle the giving and receiving of gifts, hospitality and expenses.

Human Resources policies must reflect the Church's commitment to anti-bribery and HR policies and practices relevant to the programme need to be developed. It must be clear to all employees that no employee will suffer demotion, penalty or any other adverse consequences as a result of refusing to pay bribes even where this has detrimental consequences for the work/operations of the Church. Any anti-bribery programme must be mandatory for everyone and sanctions for violations require to be agreed.

4. The policy should be communicated both internally within the Church and externally.
5. There should be a system of internal controls to counter bribery, e.g. by the Audit Committee at Central level, Superintendence Committee at Presbytery level and Finance Committee at Congregational level.

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